Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

BANK OF GUAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit erred in holding that commitments made by the United States to induce the purchase of government bonds are unenforceable because the terms and duties of government contracts are exclusively "defined by" federal law, in particular federal statutes, and not by the express promises that the government made.

RULE 29.6 STATEMENT

No publicly held company owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bank of Guam ("the Bank") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Federal Claims dismissing the Bank's complaint appears at 80 Fed. Cl. 739, and is reproduced in the Petition Appendix ("Pet. App.") at 26a-59a. The opinion of the court of appeals affirming in relevant part the judgment of the United States Court of Federal Claims appears at 578 F.3d 1318, and is reproduced at Pet. App. 1a-25a. The order of the court of appeals denying the Bank's combined petition for panel rehearing and rehearing *en banc* is reproduced at Pet. App. 60a-61a.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2009. Pet. App. 1a. The Bank's petition for rehearing was denied on December 18, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This case presents a significant question of national importance impacting the ability of private parties to rely on the terms of their contracts with the government: Is the United States bound by the specific promises it makes to induce private parties to enter into those contracts, or are the government's obliga-

tions exclusively "defined by" federal statutes and regulations? Disregarding this Court's precedent, the Federal Circuit held that federal statutes and regulations alone define "the terms and duties of any express contract," even when the contract's express terms, and the government's representations about what those terms mean, are to the contrary. Because this novel holding conflicts with *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (plurality opinion), and renders many government promises illusory, certiorari should be granted.

To induce residents of Guam to buy United States bonds,[1] the federal government repeatedly declared that interest on the bonds would not be subject to the Guam Territorial Income Tax ("GTIT"). For decades, the government maintained this position, which was reflected on the face of the bonds when they were sold in tangible form, in regulations that are incorporated into the terms of the bond agreement as a matter of law, and in a long line of federal agency communications. See 31 C.F.R. §§ 309.4, 340.3, 357.2; *Bodek* v. *Dep't of Treasury, Bureau of Pub. Debt*, 532 F.2d 277, 279 n.7 (2d Cir. 1976) (per curiam); Pet. App. 75a-97a. The Bank, along with the other Guam citizens that purchased United States bonds, relied on these clear covenants exempting interest income earned on the bonds from the GTIT, and entered into contracts with the government for hundreds of millions of dollars worth of the bonds. See *id.* at 63a-64a ¶¶ 5-6, 8.

But, after the Ninth Circuit ruled that Guam had the authority to subject interest earned on the bonds to the GTIT, *Gumataotao* v. *Dir. of Dep't of Revenue*

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[1] For simplicity, the Bank will use the term "bonds" to refer to the treasury bills, bonds, and notes that the Federal Circuit labeled "United States government obligations."

& Taxation, 236 F.3d 1077 (9th Cir. 2001), the United States reneged on its contracts. The Bank was forced to pay $17 million in taxes to Guam, despite the agreement the United States had made. Because the federal government had repeatedly contracted that the GTIT would not apply, the Bank brought this action for breach of contract.

Ignoring this Court's precedent, the Federal Circuit rejected the Bank's claim and allowed the government to abandon its longstanding contractual commitments. The court concluded that the government did not breach its contract with the Bank because "the terms and duties of any express contract are defined by the federal laws and regulations" – including the tax statutes – pertaining to government bonds. Pet. App. 14a. In other words, despite cases such as *Winstar*, which expressly recognize the existence of contractual obligations that cannot be defeated by statute, the court below determined that bondholders' contract rights are defined by – and therefore limited to – the very statute that gave rise to the breach of contract. Worse, the Federal Circuit reached this outcome without acknowledging or even citing *Winstar*.

The harmful consequences of the Federal Circuit's erroneous decision should be corrected now. Claims for contractual damages (exceeding $10,000) against the United States are exclusively heard by the Court of Federal Claims and then subject to review only by the Federal Circuit. See 28 U.S.C § 1491(a)(1). Thus, there can never be a division of lower court authority over the basic question of law presented in this case, and the Federal Circuit's unsupported holding will bind all who contract with the federal government, absent correction by this Court. As this Court has recognized in the past, it has a unique role in correct-

ing the major legal errors committed by the Federal Circuit with the potential for causing widespread mischief in a broad category of cases. See, *e.g.*, *eBay, Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 390-91 (2006); *Merck KGaA* v. *Integra Lifesciences I, Ltd.*, 545 U.S. 193, 208 (2005). Because the court's far reaching decision is irreconcilable with this Court's precedent, certiorari should be granted.

A. Factual Background

Guam is a United States territory, whose government has a legal status similar to that of a federal administrative agency. See *United States* v. *Wheeler*, 435 U.S. 313, 321 (1978) (holding that when a territorial government enforces a law, it "is not acting as an independent political community like a State, but as an agency of the federal government" (quotation omitted)), *superseded on other grounds by statute*, Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, *as recognized in United States* v. *Lara*, 541 U.S. 193 (2004); see also *Ngiraingas* v. *Sanchez*, 858 F.2d 1368, 1370-71 (9th Cir. 1988), *aff'd*, 495 U.S. 182 (1990); *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 613 F. Supp. 381, 386-87 (D. Guam 1983), *aff'd*, 764 F.2d 1285 (9th Cir. 1985). In 1950, when Congress formed Guam's territorial government, it created the GTIT as "a separate Territorial income tax, payable to the government of Guam." 48 U.S.C. § 1421i(b). There is no dispute that, although Congress enacted the GTIT, Guam (and only Guam) administers, collects, and disburses the GTIT. See *Bank of Am., Nat'l Trust & Sav. Ass'n* v. *Chaco*, 539 F.2d 1226, 1227 (9th Cir. 1976) (per curiam).

The Bank is a corporation organized under the banking laws of the Territory of Guam. Since 1978, the Bank has purchased bonds issued by the United States Treasury. As recognized by the court below,

each time the Bank purchased a bond, it entered into a contract with the United States. See Pet. App. 14a.

Every bond the Bank purchased prior to 1986 was emblazoned with the following language: "This bond is *exempt from all taxation* now or hereafter imposed on the obligation or interest herein *by* any state, or *any of the possessions of the United States*, or by any local taxing authority, except as provided in 31 U.S.C. 3124." Pet. App. 75a (emphasis added; capitalization omitted). Although the government stopped issuing bonds in paper format in 1986, and thus this language no longer appears on the face of recent bonds, similar language is included in the federal regulations that govern – and are incorporated into – the bond contracts. *Id.* at 64a ¶ 7; see, *e.g.*, 31 C.F.R. § 309.4 (treasury bills); *id.* § 340.3 (treasury bonds); see also *Bodek*, 532 F.2d at 279 n.7 ("Treasury regulations are considered an implied part of the contract between the United States and a purchaser of its bonds."); *Guldager* v. *United States*, 204 F.2d 487, 488 (6th Cir. 1953) (noting that Treasury regulations are "part of the contract" when Series E bonds are issued by the Treasury).[2]

Unsurprisingly, in light of these express covenants, the government consistently represented that the GTIT would not apply to the income earned on the bonds. On June 9, 1988, for example, the IRS Office of Chief Counsel advised the Guam Department of Revenue and Taxation that Guam's attempt to subject interest income to taxation under the GTIT was "inconsistent" with the applicable regulations. Pet.

[2] The government's Uniform Offering Circular for its bonds also states that the bonds are tax exempt. *See* 31 C.F.R. §§ 356.32(a), 357.2 (recognizing that the bonds "are exempt from taxation by a State" and defining "state" to include territories and possessions of the United States, like Guam).

App. 76a. And, in a 1987 response to a question submitted by the Bureau of the Public Debt, the Chief Counsel of the IRS made clear that "the pertinent regulations . . . exempt [bonds] from taxation by possessions," including Guam, and that this was "reflected on the debt instruments issued by the government." *Id.* at 78a. These statements echoed repeated advice the IRS provided to the government of another United States' territory, the Virgin Islands, which posed virtually the same question. See *id.* at 94a-97a (advising the government of the Virgin Islands in 1984 that Treasury regulations exempt bond income from Virgin Islands taxes).

Over the years, Guam repeatedly sought advice from the United States as to whether it could tax the interest income earned on the bonds. In every instance of which the Bank is aware, the United States government (including the Internal Revenue Service) made clear that the GTIT did not apply to the bonds. Pet. App. 64a-65a ¶ 9. "Those confirmations were generally and specifically known by the Bank, which relied on them in continuing to purchase and to hold [the bonds]." *Id.* at 65a ¶ 9.

All told, the Bank purchased hundreds of millions of dollars in government bonds over the course of more than 20 years. The Bank relied both on the explicit promises in the bonds themselves, and on the government's unwavering commitments that the applicable bond covenants found in Treasury regulations mean that interest income would not be taxed under the GTIT.

In 2001, however, the United States Court of Appeals for the Ninth Circuit held for the first time that income earned on government bonds was subject to the GTIT. *Gumataotao*, 236 F.3d at 1079. Consistent with this newly minted authority, on January 24,

2001, the Director of the Guam Department of Revenue and Taxation issued a deficiency notice demanding payment of GTIT taxes on the interest the Bank earned on government bonds. In the wake of *Gumataotao*, the Bank was forced to settle the matter with Guam. It paid a $15 million deficiency and subsequently paid more than $2 million in additional taxes for later years. Pet. App. 66a-67a ¶¶ 12, 17.

Subsequently, the Bank filed the present suit against the United States in the Court of Federal Claims. Because the United States had contractually agreed to exempt the bonds from the GTIT, the Bank sought damages for breach of contract. Specifically, the Bank contended that, even if Guam has authority to tax interest income on the bonds under *Gumataotao*, the federal government had contractually agreed that the income was free of the Guam tax and had therefore assumed the risk that Guam would collect such a tax on the interest earned on those bonds.

B. Proceedings Below

1. The Court of Federal Claims granted the government's motion to dismiss. The court first held that the Bank's claims relating to tax years before 2001 were untimely under the applicable six-year statute of limitations. Pet. App. 59a. The court then dismissed the remaining claims pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id.* Relying on the Ninth Circuit's statutory holding in *Gumataotao*, the Court of Federal Claims ruled that, because "income earned on USGOs is . . . subject to the GTIT" as a statutory matter, "the imposition of the GTIT cannot constitute a breach of either an express or implied contract." *Id.* at 57a.

2. The Bank appealed to the Federal Circuit, challenging both the statute of limitations holding and

the Rule 12(b)(6) dismissal. Although the Federal Circuit disagreed with the Court of Federal Claims' decision regarding the timeliness of the Bank's claims and found the suit timely, it nevertheless affirmed on the merits, repeating the errors of the decision below. The court acknowledged that *Gumataotao* (and another Ninth Circuit decision, *Bank of Am.*, 539 F.2d 1226) only "address[ed] tax claims rather than contract claims." Pet. App. 18a. Nevertheless, the court relied on those decisions to conclude that "the GTIT was enacted by, authorized by, and 'imposed by' Congress." *Id.* Eliding the distinction between tax statutes and bond contracts, and without even citing *Winstar*, the Federal Circuit determined that the Ninth Circuit had addressed a "nearly identical issue" and simply adopted its analysis wholesale. *Id.*

The Federal Circuit explained its focus on the meaning of the statutory provision, rather than the terms of the contract. According to the panel, "[i]t is . . . clear that the terms and duties of any express contract are defined by the federal laws and regulations" – here, the federal tax statutes – pertaining to government bonds.[3] Pet. App. 14a. Because this holding conflicts with *Winstar*, the Bank filed a petition for panel rehearing and *en banc* review with the Federal Circuit. The petition was denied. *Id.* 60a-61a.

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[3] The court below also denied petitioner's additional claims for breach of an implied-in-fact contract and for contractual reformation based on mutual mistake. Pet. App. 21a-22a. Those holdings are not likely to survive analysis if this Court accepts and reviews this case. Therefore, they are not separately addressed here.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision grants the government a license to induce the purchase of government bonds through empty and unenforceable contractual commitments. Here, the government promoted the purchase of its bonds by contracting for decades that the interest income would not be subject to the GTIT. The Bank and other residents of Guam relied on those promises and purchased millions of dollars worth of the bonds. When the United States reneged on the deal, it breached its contracts with all Guam bond holders, including the Bank.

Nonetheless, by ignoring *Winstar*, the Federal Circuit affirmed the dismissal of the Bank's claims. According to the Federal Circuit, "the terms and duties of any express contract" with the federal government are "defined by the federal laws and regulations" – here the federal tax statutes – pertaining to government bonds. By this reading, the Federal Circuit not only allowed the government to breach its contracts with the Bank, but also opened the door to a system in which no express government covenant may be enforced, unless it is also specifically expressed in a statute or regulation. Such a result is untenable and in square conflict with *Winstar*. Only this Court can correct this error, and it should grant certiorari to do so.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT

A. The Federal Government May Confer Contractual Rights That Extend Beyond The Specific Terms Identified In A Federal Statute.

It is well established that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch* v. *United States*, 292 U.S. 571, 579 (1934) (Brandeis, J.). It is because government promises are subject to the rigors of the law of contracts that private parties can enter contracts confident that the government will be held to the terms of its agreements.

Recognizing the importance of this principle, this Court held in *Winstar* that the United States was liable for contract damages when Congress repudiated an agreement the government had reached with private parties. In *Winstar*, the Federal Home Loan Bank Board ("Bank Board") encouraged financially secure savings and loans to acquire failing thrifts by promising to allow the healthy institutions to designate the excess of the purchase price over the fair value of the failing institutions as "supervisory goodwill" that could be counted toward the capital reserve requirements mandated by federal regulations. Congress, however, passed a statute precluding thrifts from counting goodwill credits toward their capital reserve requirements, thereby preventing the Bank Board from fulfilling its contract to provide a particular regulatory treatment to the acquiring thrifts.

In *Winstar*, this Court declared that Congress had breached an enforceable covenant made by the Bank

Board, and that the government was thus liable for breach of contract damages.[4] Notably, the only enforceable promise at issue in *Winstar* was the covenant that the Bank Board would provide particular regulatory treatment to the thrifts, and not a guarantee made through a particular statute. Indeed, the promise was contradicted by the statute that Congress enacted. At the heart of *Winstar*, therefore, is the basic premise that the executive branch can assume performance obligations in addition to the baseline requirements established through a federal statute.[5] *Cf. Winstar*, 518 U.S. at 885 (Souter, J.) (suggesting that in determining whether the government has breached an agreement there is no difference between a government obligation established through a Congressional statute and one made by the representations of a government agency).

This rule makes complete sense. A regime in which the only enforceable agreements with the government are those specifically memorialized in federal law would allow the government to freely breach its promises that had been reasonably relied upon by private parties, since contracts rarely follow statutory authorization language verbatim. Accordingly, under *Winstar*, when the United States agrees with a private party to deploy particular regulatory treatment,

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[4] While *Winstar* was a plurality opinion, *see Winstar*, 518 U.S. 839, seven members of the Court joined in this aspect of the holding. *See id.* at 919-24 (Scalia, J., concurring in the judgment).

[5] This is not to say that the executive branch can enter into contracts without statutory authority. Such authority is necessary, and here it was duly conferred by Congress on the Secretary of the Treasury. *See* 31 U.S.C. §§ 3104, 3121. The Federal Circuit did not question the executive branch's authority to enter into the contracts in question; rather, the Federal Circuit simply misconstrued those contracts.

and Congress enacts a contrary rule by statute, the United States is liable for breach of contract.

B. The Federal Circuit Erred In Holding That The Duties Required By The Express Contract Between The Bank And The United States Are Determined By Federal Statutes.

Nonetheless, instead of looking to the terms of the agreement between the Bank and the government to determine whether a breach occurred, the Federal Circuit focused on the language of the statute creating the GTIT and the Ninth Circuit's decision construing that statute. According to the Federal Circuit, that statute "defined" the terms of the agreement between the Bank and the federal government.[6] See Pet. App. 14a-15a; see also *id.* at 18a (stating that *Gumataotao* "addressed the nearly identical issue – whether [government bonds] are exempt from taxation by the GTIT"). The court deemed any express government covenants inconsistent with that statute irrelevant.

1. That, of course, was wrong and fundamentally at odds with the whole point of *Winstar*: the executive branch can confer additional rights by contract beyond what Congress defines by statute. It is well

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[6] It is no response that the Bank has "acknowledge[d]" that its contract rights are governed by a series of federal regulations. Pet. App. 15a (quoting Bank Br. at 23). Such an acknowledgement is unremarkable. As the complaint alleges, once the government stopped issuing bonds in paper form, the government could not include its covenant regarding the tax exemption on the face of the bonds; accordingly, the government continued to state the covenant in the regulations. *Id.* at 64a ¶ 7. The Bank did not, however, concede that "the terms and duties of any express contract" are "defined," and hence limited, by a tax statute. *Winstar* is to the contrary.

established that, when the government enters into a contract, it generally must honor its promises like any other private party that makes a contractual commitment. See, *e.g.*, *Lynch*, 292 U.S. at 579 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."). Government contracts are not mere empty shells that bestow nothing more than rights already codified elsewhere.

But, despite the applicability of *Winstar* and the parties' extensive briefing devoted to that case, the Federal Circuit did not even cite this Court's decision. Instead, the court relied on cases that did not even involve contracts, much less establish that contract rights are "defined by" federal tax statutes. See Pet. App. 14a-15a (citing *United States* v. *Chandler*, 410 U.S. 257, 260-61 (1973) (per curiam) (question of federal estate tax); *Free* v. *Bland*, 369 U.S. 663, 669-70 (1962) (preemption case); *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *Parnell*, 352 U.S. 29, 34 (1956) (choice-of-law issue)). None of these cases, all of which preceded *Winstar*, remotely undermines *Winstar*'s clear holding.

The Ninth Circuit cases on which the Federal Circuit relied, *Gumataotao* and *Bank of America*, are equally inapposite. Both concerned statutory questions. *Gumataotao*, 236 F.3d at 1082 (interpreting 31 U.S.C. § 3124); *Bank of Am.*, 539 F.2d at 1227 (interpreting statute allowing local governments to tax bank income). Neither involved a contract, and neither addressed the contractual promises the government had made.[7]

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[7] Indeed, *Bank of America* did not even address the statute that is implicated here, 31 U.S.C. § 3124, but an entirely different banking statute. *See* 539 F.2d at 1228 (holding that the

2. Yet, by conflating contract rights and statutory rights, the Federal Circuit affirmed a dismissal on the pleadings and refused to permit consideration of the overwhelming extrinsic evidence of the parties' intent. Pet. App. 19a ("Because the laws and regulations governing USGO's, and thus the terms of the Bank's express contract, clearly do not exempt USGOs from taxation by the GTIT, such parol evidence cannot be considered to interpret the Bank's contract with the United States."). Such evidence would have confirmed what the Bank alleged in its complaint: the federal government repeatedly represented that the bonds were not subject to the GTIT, and the Bank relied on these inducements. *Id.* at 64a-65a ¶¶ 8, 9. For example, as noted, in 1988, the IRS Office of Chief Counsel advised Guam that its attempt to apply the GTIT to bond income was "inconsistent" with the applicable regulations. *Id.* at 76a. And, in 1987, the IRS similarly advised the Bureau of the Public Debt that U.S. possessions, including Guam, could not tax bond income. *Id.* at 91a-92a.

If the Federal Circuit had not confused contractual rights with statutory rights, which *Winstar* specifically forbids, it could not have disregarded the allegations in the complaint or precluded consideration of such evidence. The bonds themselves, when in hard copy and through the terms of the applicable regulations, do not contradict the Bank's argument. Quite the contrary, they provide that each bond "is exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States."[8] Pet.

GTIT "is not a tax imposed by Guam for the purposes of 12 U.S.C. § 548"). The Ninth Circuit thus could not have circumscribed the contractual promise that the United States repeatedly made.

[8] The bonds state that there is an exception to the exemption,

App. 75a (capitalization omitted). Later bonds include terms that provide with greater clarity that the securities are "exempt from taxation by a State," and define "State" to include U.S. possessions like Guam. 31 C.F.R. §§ 356.32(a) & 357.2; see also 26 U.S.C. § 7651(1) & (2)(B) (laws governing assessment and collection of federal taxes "extend to and [are] applicable in [U.S. possessions] in the same manner and to the same extent as if such possession were a State"). Parol evidence would confirm that the government itself believed that its covenants to the citizens of Guam, including the Bank, exempted income earned on government bonds from the GTIT.

In any event, only Guam enforces, calculates, demands, assesses, and collects the tax. Thus, in ordinary parlance, Guam "imposes" the tax (even if, under an alternative definition of the word, one which focuses on enactment, Congress could also be said to be imposing the tax). The leading legal dictionary defines "impose" as "[t]o *levy or* enact," a disjunctive phrasing that underscores that the term reaches actions beyond the legislative origins of a tax. See *Black's Law Dictionary* 759 (7th ed. 1999) (emphasis added). Other dictionaries similarly define "impose" to mean "apply," "levy," and "charge." See, *e.g.*, *Webster's Third New International Dictionary of the English Language* 1136 (1993) ("to establish," "to apply . . . as compulsory," "levy," and to "charge" or "impute" (capitalization omitted)).

It is a long-standing principle that the terms of the government's contract with the Bank should have

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"as provided in 31 U.S.C. § 3124," but the exception is irrelevant. *See* 31 U.S.C. § 3124 ("(1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and (2) an estate or inheritance tax").

been strictly construed against the government as the party that drafted the terms of the agreement. *Garrison* v. *United States*, 74 U.S. (7 Wall.) 688, 690 (1868); see *United States* v. *Seckinger*, 397 U.S. 203, 210-11 (1970); *Cole* v. *Young*, 351 U.S. 536, 556 (1956). Especially in light of this rule, the most the United States can establish is that the word "impose" is ambiguous, in which case parol evidence is necessary, and dismissal was inappropriate. See also *Lewyt Corp.* v. *Comm'r*, 349 U.S. 237, 239-40 (1955) (holding that the word "impose" can have multiple meanings in the tax context: Congress could have used "the word 'imposed' . . . in one of two different senses"). Moreover, the extrinsic evidence, including the government's repeated representations on the scope of the exemption, conclusively resolves the ambiguity in the Bank's favor and makes clear that the contracting parties never intended to subject the bonds to the GTIT.

3. None of the arguments the government raised below counsels against granting certiorari. First, the United States contended that *Winstar* did not concern contract formation and thus does not bear on the question whether the Bank had a contract for a GTIT exemption. As the Federal Circuit recognized, however, "it is not disputed that, with the purchase of the USGOs, the Bank and the United States entered into a contract." Pet. App. 14a. The only question, therefore, is whether that contract provided for an exemption from the GTIT. The court held it did not, solely based upon its erroneous conflation of contract rights with statutory duties. It is that conflation that cannot be squared with – and, indeed, largely guts – *Winstar*.

Second, the government notes that the tax statute construed in *Gumataotao* in 2001 was enacted in

1950, before the Bank began purchasing bonds in 1978. That, of course, is true, but it is also inconsequential. Contract rights can exceed statutory rights, and the government repeatedly promised the Bank, as an inducement to purchase the bonds, that it would not be subject to the GTIT on its bond income. The Bank relied on the government's covenants, and when Guam started collecting the GTIT in the wake of *Gumataotao*, the Bank suffered damages. In collecting the tax, Guam was acting as a federal agency. See *Wheeler*, 435 U.S. at 321. Its collection of the tax deprived the Bank of the benefits of the bargain made by another federal agency, the Department of the Treasury and specifically its Bureau of the Public Debt. Under *Winstar*, the government is liable much like any private party that breaches a contractual agreement.

Third, in its *Winstar* discussion, the United States asserts that courts should not infer an agreement for a tax exemption unless the agreement will "admit of no other reasonable interpretation." But, even assuming that this doctrine applies when the United States is making a promise with respect to a tax assessed and collected by a territory (a proposition for which the United States cited no authority), it lends no support to the government here. As explained, even if the contractual term "imposed" is ambiguous in the abstract, it is clear what the parties intended in light of the extrinsic evidence, including the federal government's repeated representations that the GTIT would not apply. Under the ordinary rules for interpreting contracts, the promise was unambiguous.

In any event, there is a more fundamental problem with the government's arguments. None of them was the basis for the Federal Circuit's decision, which in-

stead rested solely on the unprecedented view that government contract rights are "defined by" a federal statute. Because that decision is incompatible with *Winstar*, this Court should grant certiorari and vacate the opinion below.

4. The consequences of the Federal Circuit's errant decision cannot be overstated. If nonstatutory government promises are unenforceable, then the United States is free to disregard its end of a bargain after it has obtained full private party performance, such as (in this case) the purchase of its bonds. *Caveat emptor* would be the prevailing rule in government contracting, generally, and in the purchase of government bonds, specifically. If nothing else, the decision below undermines the confidence current and future bondholders can have in the federal government's agreements when those covenants have not been codified. This case is ripe for review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 18, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

No. 2008-5078.

BANK OF GUAM,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Aug. 12, 2009.
Rehearing and Rehearing En Banc
Denied Dec. 18, 2009.

Before LOURIE, SCHALL, and GAJARSA, *Circuit Judges*.

SCHALL, *Circuit Judge*.

Bank of Guam (the "Bank") appeals from the final judgment of the United States Court of Federal Claims that dismissed its suit for breach of contract against the United States. *Bank of Guam v. United States*, 80 Fed.Cl. 739 (2008) ("*Dismissal Order*"). The Bank brought suit against the United States alleging that Guam's collection of the Guam Territorial Income Tax ("GTIT") on interest income received by the Bank from certain United States government obligations ("USGOs" or "bonds") breached a promise by the United States that income from the USGOs

held by the Bank would not be subject to taxation by the GTIT. The Court of Federal Claims entered judgment dismissing the Bank's complaint after granting the government's motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"). *Id.* at 753-54. The court granted the government's motions because it concluded that (1) certain of the Bank's claims were barred by the statute of limitations set forth at 28 U.S.C § 2501; and (2) as far as the remaining claims were concerned, collection of the GTIT did not constitute the breach of either an express or implied-in-fact contract between the United States and the Bank. As set forth below, we disagree with the court's statute of limitations ruling, which we reverse. We agree with the court, however, that the United States did not breach any express or implied-in-fact contract with the Bank. We therefore affirm the final judgment of dismissal.

BACKGROUND

I.

In 1950, Congress enacted the Organic Act of Guam, establishing the government for the U.S. Territory of Guam. *See* Organic Act of Guam, Pub.L. No. 630, 64 Stat. 384 (1950) (codified at 48 U.S.C. § 1421) ("the Organic Act"). The Organic Act provides that the "income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam." 48 U.S.C. § 1421i(a).[1] Those "income-tax

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[1] In pertinent part, 48 U.S.C. § 1421i provides:

> (a) Applicability of Federal laws; separate tax
>
> The income-tax laws in force in the United States of America and those which may hereafter be enacted shall

laws" are governed by Title 26 of the United States Code, the Internal Revenue Code ("IRC"). Congress further provided that "[t]he income-tax laws in force in Guam pursuant to subsection (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the 'Guam Territorial income tax [i.e., GTIT].'" § 1421i(b).

By instituting the GTIT, Congress decided to "mirror" the IRC, rather than create an entirely new tax code for Guam. In other words, except for those provisions of the IRC that are "manifestly inapplicable or incompatible with the intent" of § 1421i, IRC § 1 applies to Guam taxpayers as GTIT § 1. *See* 48 U.S.C. § 1421i(d)(1). *See generally Sayre & Co. v. Riddell*, 395 F.2d 407 (9th Cir.1968) (explaining "mirroring" and that § 1421i created a "taxing structure for Guam 'mirroring' the provisions of the federal tax code"). In effect, the GTIT "mirrors" the IRC by substituting certain terms in the IRC for terms pertinent to Guam, such as replacing "United States" with "Guam." *See* § 1421i(e) ("Substitution of terms"). In order to relieve extra administrative burden, the GTIT is collected and disbursed by Guam, instead of

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be held to be likewise in force in Guam: *Provided*, That notwithstanding any other provision of law, the Legislature of Guam may levy a separate tax on all taxpayers in an amount not to exceed 10 per centum of their annual income tax obligation to the Government of Guam.

(b) Guam Territorial income tax

The income-tax laws in force in Guam pursuant to subsection (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the "Guam Territorial income tax."

by the U.S. Treasury. *See, e.g., Bank of Am. v. Chaco*, 539 F.2d 1226, 1227 (9th Cir.1976) ("[T]he enactment of . . . the territorial income tax was done primarily to relieve the United States Treasury of the necessity of making direct appropriations . . . ."). In that way, the GTIT acts as a U.S. federal income tax for those living in Guam, who would otherwise not have to pay U.S. federal income tax.

The U.S. Treasury is authorized to issue USGOs, such as Treasury bills and bonds. *See, e.g.*, 5 U.S.C. § 301; 12 U.S.C. § 391; 31 U.S.C. §§ 3102-3104 (pertaining to bonds, notes, and Treasury bills); 31 U.S.C. § 3121 (authorizing the Secretary of the Treasury to prescribe rules and regulations pertaining to USGOs). While USGOs, and the interest earned on them, are typically subject to federal income tax for U.S. taxpayers, *see generally* 26 U.S.C. § 61 (including interest in definition of "gross income"), USGOs are "exempt from taxation by a State or political subdivision of a State," 31 U.S.C. § 3124(a)[2]; *see* 31 C.F.R. § 356.32 ("exempt from taxation by a State or political subdivision of a State"). Treasury regulations also

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[2] Section 3124 provides:

> (a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except—
>
> (1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and
>
> (2) an estate or inheritance tax.

31 U.S.C. § 3124(a). The two exceptions listed in § 3124 (a)(1)-(2) are not relevant to this appeal.

state that USGOs "shall be exempt from all taxation now or hereafter imposed on the principal or interest thereof by any State, or any of the possessions of the United States, or by any local taxing authority." 31 C.F.R. §§ 309.4, 340.3, 345.5. In addition to the aforementioned regulations that explicitly exempt USGOs from taxation imposed by a possession, other Treasury regulations define "State" to include "any . . . territory or possession of the United States." 31 C.F.R. § 357.2. At no time, however, have there been statutes or regulations that explicitly exempt USGOs from taxation by the *GTIT*.

II.

The facts pertinent to this appeal are not in dispute and are set forth in the decision of the Court of Federal Claims. *See generally Dismissal Order*, 80 Fed.Cl. at 739. The Bank is a resident of Guam and, in 1978, it began purchasing USGOs, including Treasury bills and bonds, each imprinted with a statement "that they were 'exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States.'" Bank's Compl. ¶ 7. Although USGOs purchased after 1986 were no longer issued in paper form and therefore could not include the printed statement, various federal regulations maintained the language previously printed on the USGOs. *See, e.g.*, 31 C.F.R. § 309.4 (Treasury Bills); 31 C.F.R. § 340.3 (Treasury Bonds); 31 C.F.R. § 356.32 (Treasury Bills, Notes, and Bonds).[3]

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[3] We recognize that the statutes and regulations governing the USGOs, and in particular 31 U.S.C. § 3124 (providing the tax exemption for USGOs), have been slightly amended and modified during the period beginning with the Bank's initial purchase of USGOs in 1978 through its most recent purchases

On January 24, 2001, the Director of the Guam Department of Revenue and Taxation ("GDRT") issued a Notice of Deficiency to the Bank for tax years 1992-94, contending that the Bank owed GTIT taxes on the interest earned on the Bank's USGOs. In response, the Bank initiated a suit in the United States District Court for the District of Guam, contending that Guam could not, through the GTIT, collect taxes on USGOs. *Bank of Guam v. Dir. of Dep't of Revenue & Taxation*, No. 01-00016, 2002 U.S. Dist. LEXIS 9662 (D.Guam May 14, 2002) ("*Guam Tax Ruling*"). Ruling to the contrary, the court decided that the Ninth Circuit's decision in *Gumataotao v. Director of Department of Revenue & Taxation*, 236 F.3d 1077 (9th Cir.2001), "directly contradicts the petitioner's assertion that the respondent erred when he determined that Guam could tax the interest income on [bonds]." *Guam Tax Ruling*, 2002 U.S. Dist LEXIS 9962, at *7. Agreeing with *Gumataotao*, the court expressly held that the "GTIT does not exempt interest paid to Guam residents from [USGOs]." *Id.* at *6. Thus, the court dismissed the Bank's claim pursuant to Fed.R.Civ.P. 12(b)(6) accordingly. *Id.* at *7. Subsequently, instead of appealing the district court's decision to the Court of Appeals for the Ninth Circuit, the Bank settled with the GDRT, paying the GTIT taxes owed and abandoning its case. *Dismissal Order*, 80 Fed.Cl. at 743.

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impacted by this appeal. Neither party, however, has relied on these modifications to support its position and, in fact, both parties primarily focus on language that has remained relatively constant—namely, the "taxation by" or "imposed by" language. Thus, for purposes of this opinion, we assume, unless noted otherwise, that these slight modifications over the relevant years do not substantively impact our analysis.

III.

On January 17, 2007, the Bank filed its four-count complaint in the Court of Federal Claims, putting forth many of the same arguments it had advanced in the District Court of Guam, but as breach of contract claims. The Bank requested a monetary award equaling the amount of tax it paid in settlement with the GDRT "for all open tax years through and including 2001" plus the amount of tax it paid to the GDRT commencing in 2002. Bank's Compl. ¶¶ 12, 20. The first count of the complaint alleged that, because Guam sought to collect GTIT on income from the USGOs, the United States had breached a contractual promise that income from the USGOs would be exempt from taxation imposed by a possession. *Id.* ¶¶ 18-20. The second count contended that all bond contracts should be reformed "to contain an obligation on the part of the United States government, requiring it to reimburse and indemnify the Bank." *Id.* ¶ 26. In its third count, the Bank alleged an implied-in-fact contract requiring the United States to reimburse the Bank all taxes it had paid on the USGOs. *Id.* ¶ 30. Finally in count four, because the Bank "expect[ed] to continue to purchase and hold USGOs," and because collecting the GTIT on USGOs amounted to a breach of present and future USGO contracts, the Bank sought declaratory relief requiring the government to "reimburse the Bank on a forward basis for all sums which the Bank will hereafter be obliged to pay." *Id.* ¶¶ 33-35; *id.* WHEREFORE clause ¶ 3.

The government filed motions to dismiss all counts under RCFC 12(b)(1) and 12(b)(6). Pursuant to RCFC 12(b)(1), the government argued that the Court of Federal Claims lacked jurisdiction over all of the

Bank's contract claims because those claims were barred by the Tucker Act's, 28 U.S.C. § 1491(a), statute of limitations. *See* 28 U.S.C § 2501 (requiring filing "within six years after such claim first accrues"). In particular, the government contended that, even assuming that some contract was breached, any possible date of such breach was not within six years of when the Bank filed suit, January 17, 2007, and was therefore outside the statute of limitations. In addition and specific to the Bank's demand for declaratory relief, the government contended that the court lacked jurisdiction over the Bank's demand because it was not based on contracts in existence. Alternatively, the Government moved to dismiss all counts for failure to state a claim pursuant to RCFC 12(b)(6), arguing that the contract claims were meritless because the Ninth Circuit's *Gumataotao* decision had already rejected the Bank's exact argument.

Considering first the Government's contention that the Bank's suit was barred by the six-year statute of limitations, the court ruled that:

> [t]he filing of the Notice of Deficiency in January 2001 . . . constituted an actual breach . . . . Plaintiff filed suit within six years of this actual breach. Defendant's motion to dismiss for lack of jurisdiction based on the time bar of the statute of limitations therefore is denied.

Dismissal Order, 80 Fed.Cl. at 746. Subsequently, however, the court dismissed the Bank's breach of contract claims with respect to all tax years prior to 2001 pursuant to RCFC 12(b)(1). *Dismissal Order*, 80 Fed.Cl. at 753.

Finding numerous decisions of the Ninth Circuit on similar issues instructive, the court then dismissed the Bank's express contract, implied-in-fact contract, and reformation counts under RCFC 12(b)(6). *Id.* at 751-54. In particular, the court agreed with the reasoning in the *Bank of America* and *Gumataotao* decisions. The 1976 decision in *Bank of America* analyzed many of the same statutes that the Court of Federal Claims faced in this case, including Guam's Organic Act, and ruled that the GTIT "was not a tax imposed by Guam," but instead imposed by Congress. 539 F.2d at 1227-28. At the same time, the Court of Federal Claims read the *Gumataotao* decision as answering the question before it, although in the context of tax claims—namely, whether USGOs are exempt from taxation by the GTIT. 236 F.3d at 1079-82. The *Gumataotao* court definitively answered in the negative, ruling that the GTIT "does not make interest from U.S. bonds non-taxable for Guam residents" because "Congress, not the local legislature of Guam, imposed the tax on interest from federal bonds." *Id.* at 1081-82.

Finally, the court dismissed the Bank's declaratory relief count under RCFC 12(b)(1). *Dismissal Order*, 80 Fed.Cl. at 747. In doing so, the court highlighted its limited jurisdiction to entertain declaratory relief and determined that the Bank's declaratory count did not fall within this limited jurisdiction. *Id.* The court also noted that "to the extent that [the declaratory relief] presumes a money judgment under the [other contract counts]; it has been orphaned." *Id.* After the court dismissed the Bank's suit in its entirety, the Bank filed a motion for reconsideration, which the court denied. The court entered judgment accordingly and the Bank timely appealed. We have appellate jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

On appeal, the Bank suggests that the Court of Federal Claims erred in dismissing all of its counts for numerous reasons. First, regarding the court's dismissal pursuant to RCFC 12(b)(1) of the breach of contract claims with respect to all tax years prior to 2001, the Bank contends that the court's decision is inconsistent. Specifically, the Bank highlights that the court determined that the 2001 Notice of Deficiency was the breach, thus triggering the six-year statute of limitations, and that the court then found that the Bank filed its contract claims within the requisite six-year limitations period. Yet, according to the Bank, the court later dismissed pursuant to RCFC 12(b)(1) all claims for breach of contract relating to all tax years prior to 2001. The Bank points out that the court did so despite the fact that the 2001 Notice of Deficiency contained tax deficiencies for tax years prior to 2001.

Next, the Bank contends that the court's RCFC 12(b)(6) dismissal of its contract claims was erroneous. According to the Bank, it had a contract with the government that exempted USGOs from taxation by the GTIT. First, the Bank points out that USGOs are contracts with the United States. The Bank then argues that U.S. Treasury statutes and regulations, for example 31 C.F.R. §§ 356.32(a) and 357.2, state that these USGOs are exempt from taxation by any State, which is defined to include U.S. possessions. Thus, according to the Bank, because the United States authorized the statutes and regulations exempting USGOs from taxation by Guam, and because the United States Congress then authorized Guam to tax its USGOs, the United States breached its contractual obligation with the Bank.

Specific to its implied-in-fact contract claim, the Bank argues that, if the language of the statutes and regulations governing the USGOs does not exempt them from taxation by the GTIT, then the United States exhibited conduct that implies a contract exempting USGOs from the GTIT. In particular, the Bank points to documents obtained through an August 22, 2002 Freedom of Information Act ("FOIA") request, allegedly evidencing that the Bank, Guam, and the United States all understood that "the Treasury regulations exempted the bond income from taxes by territories and possessions."

Regarding its reformation count, the Bank argues that, if the contract is read to only exempt "taxes legislated or imposed by Guam on its own authority," then it is entitled to reformation to reflect the true understanding between the United States and the Bank. Specifically, according to the Bank, the contract should reflect that at all times the United States represented that income from the bonds was not taxable by the GTIT. Concerning its claim for declaratory relief, the Bank argues that the court had jurisdiction over its claim for declaratory relief because it is ancillary to the claims for monetary relief properly before the court. The Bank, however, recognizes that the Court of Federal Claims has limited ability to hear claims for declaratory relief.

We address each of the Bank's contentions in turn.

I.

As an initial matter, we first consider whether the court properly dismissed portions of the Bank's contract claims pursuant to RCFC 12(b)(1). "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower

courts in a cause under review," and therefore we must determine whether the Court of Federal Claims properly dismissed the Bank's contract claims for lack of subject matter jurisdiction. *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934); *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. Dep't of Homeland Sec.*, 490 F.3d 940, 944 (Fed. Cir.2007). This Court reviews a dismissal of a claim for lack of jurisdiction by the Court of Federal Claims *de novo*. *Adair v. United States*, 497 F.3d 1244, 1250 (Fed.Cir.2007). A well pleaded allegation of a breach of either an express or implied-in-fact contract is sufficient to overcome challenges to jurisdiction. *Trauma Serv. Group v. United States*, 104 F.3d 1321, 1325 (Fed.Cir.1997). Any claim for relief, however, must be "filed within six years after such claim first accrues." 28 U.S.C § 2501.

We hold that the Court of Federal Claims did have jurisdiction over the Bank's breach of contract claims for all tax years prior to 2001. We therefore reverse the court's decision to the contrary. In order for the Court of Federal Claims to have jurisdiction, the statute of limitations requires filing suit within six years after a claim—in this case, the alleged breach of contract—accrues. *See* 28 U.S.C. § 2501. Because the Bank filed suit on January 17, 2007 and the Notice of Deficiency issued on January 24, 2001, and because the Notice of Deficiency contained tax assessments for tax years prior to 2001, the court erred in dismissing the Bank's breach of contract claims for all years prior to 2001. Thus, we reverse the court's dismissal pursuant to RCFC 12(b)(1) for all tax years prior to 2001 and hold that subject matter jurisdiction was proper for those claims. This does not prevent us from dismissing those claims, however, because, as explained below, those claims were

properly dismissed pursuant to RCFC 12(b)(6). *See Adair*, 497 F.3d at 1258 (reversing the Court of Federal Claims' dismissal pursuant to RCFC 12(b)(1), yet addressing the merits and affirming based on RCFC 12(b)(6)).

II.

We turn now to the dismissal of the Bank's express and implied contract claims pursuant to RCFC 12(b)(6). "The question of whether a complaint was properly dismissed for failure to state a claim upon which relief could be granted is one of law, which we review independently." *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed.Cir.1995). In order to avoid dismissal for failure to state a claim, the complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *see Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed.Cir.2009). The factual allegations must be enough to raise a right to relief above the speculative level. *See Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. "In ruling on a 12(b)(6) motion to dismiss, the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." *Cambridge*, 558 F.3d at 1335. This court, however, reviews questions of law and legal interpretations *de novo*. *Adair*, 497 F.3d at 1250; *Trauma Serv. Group*, 104 F.3d at 1325.

A.

A party alleging either an express or implied-in-fact contract with the government "must show a mutual intent to contract including an offer, an acceptance,

and consideration." *Trauma Serv. Group*, 104 F.3d at 1325. Furthermore, "[a] contract with the United States also requires that the Government representative who entered or ratified the agreement had actual authority to bind the United States." *Id.* "The question of whether a contract creates a duty is . . . a question of law." *Id.*

In order to frame the issue of the government's alleged breach of an express contract, it is helpful to identify what is not in dispute. First, it is not disputed that, with the purchase of the USGOs, the Bank and the United States entered into a contract. *See, e.g., Estate of Berg v. United States*, 231 Ct.Cl. 466, 687 F.2d 377, 379-83 (1982) (treating U.S. Treasury Bonds as a contract with the government); *see also Zelman v. Gregg*, 16 F.3d 445, 446 (1st Cir. 1994) ("Broadly speaking and with certain qualifications, government bonds are viewed as contracts between the government and the owners, whose terms are fixed by statutes, regulations and offering circulars.").[4] Indeed, the Bank acknowledges that "government bonds are contracts between the United States and the bond holders." Bank's Br. 16. It is also clear that the terms and duties of any express contract are defined by the federal laws and regulations pertaining to USGOs. *See, e.g., United States v. Chandler*, 410 U.S. 257, 260-61, 93 S.Ct. 880, 35 L.Ed.2d 247 (1973) (stating that transfer restrictions on Savings bonds could not be modified to contradict the terms "clearly spelled out by the Secretary in his regulations"

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[4] We have not previously addressed some of the exact issues presented in this appeal and, thus, while not binding, the decisions of other regional circuits are persuasive authority and instructive. *See, e.g., Summit Tech., Inc. v. Nidek Co.*, 435 F.3d 1371, 1376-77 (Fed.Cir.2006).

and "authorized by Congress"); *Free v. Bland*, 369 U.S. 663, 669-70, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962) (holding that Federal statutes and regulations "govern[ ] the interpretation . . . of the rights and obligations created by the Government bonds" (quoting *Bank of Am. Trust & Savs. Ass'n v. Parnell*, 352 U.S. 29, 34, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956))); *see also* 31 U.S.C. §§ 3102-4, 3111, 3121 (authorizing the Secretary of the Treasury to pass regulations governing USGOs). The Bank acknowledges this point as well, stating that its contract "rights are 'governed solely' by the regulations." Bank's Br. 23. Thus, in determining the duties required by the express contract between the Bank and the United States, we look to the federal laws and regulations governing the USGOs.

The United States Code exempts USGOs, and likewise interest earned on USGOs, "from taxation by a State or political subdivision of a State." *See* 31 U.S.C. § 3124(a); *see also* 31 C.F.R. § 356.32(a) (stating that USGOs are "subject to all applicable taxes imposed under the Internal Revenue Code. . . . Under [§ 3124], the securities are exempt from taxation by a State or political subdivision of a State"). By regulation, Guam is considered a "State" for purposes of this exemption. *See, e.g.*, 31 C.F.R. § 357.2 ("State means any . . . territory or possession of the United States."). Language in other regulations exempts USGOs "from all taxation . . . imposed on the principal or interest thereof by any State, or any of the possessions of the United States, or by any local taxing authority." *See, e.g.*, 31 C.F.R. §§ 309.4, 340.3. Thus, the terms of the express contract between the Bank and the United States provide that the USGOs will be exempt "from all taxation . . . imposed . . . by"

Guam and, therefore, we must determine whether the GTIT falls into this category. It does not.

Focusing on the relevant question, it is quite clear that Congress, not Guam, enacted, authorized, or otherwise imposed the GTIT. Consequently, it is clear that the Bank's USGO contracts do not contain a duty to exempt them from taxation by the GTIT. Thus, there is no breach for imposing the GTIT on the USGOs. Importantly, in arguing that the contracting and breaching party is the government, as it must for jurisdiction in the Court of Federal Claims, *see, e.g., Ransom v. United States*, 900 F.2d 242, 245 (Fed.Cir.1990) (affirming dismissal of breach of contract claims because there was no contract with the government), the Bank emphasized that Guam has nothing to do with the GTIT except for collecting it. Indeed, the Bank repeatedly conceded during briefing that Congress has nearly everything to do with the GTIT—namely, Congress "authorized," "enabled," "caused," and otherwise "imposed" the GTIT. *See, e.g.*, Bank's Br. 16 ("A review of the complaint will show that the Bank has consistently maintained that it was Congress . . . which caused this tax to apply."); *id.* at 17 ("Congress had authorized or enabled the tax which the Bank had to pay to Guam"); Bank's Compl. ¶ 13 ("Congress . . . authoriz[ed] the imposition of the Guam territorial income tax" on the USGOs). The Bank even made this same admission at oral argument:

> Court: "Do you say that *Gumataotao* was wrong in its holding that the U.S. Congress imposed this tax?"
>
> Bank: "No. And our complaint alleges that Congress imposed this tax."

Oral Arg. 8:10-21, Mar. 6, 2009, *available at* http://oralarguments.cafc.uscourts.gov.

Regardless of the Bank's admissions, it is clear that Congress enacted, through 48 U.S.C. § 1421i, the GTIT, which "mirrors" the federal IRC. *See, e.g., Ramsey v. Chaco*, 549 F.2d 1335, 1338 (9th Cir.1977) ("Section 31 of the Organic Act . . . [requires] substantive changes in the income tax laws of Guam must be left to Congress."); *Sayre*, 395 F.2d at 410 (the Organic Act "creat[ed] a separate integral taxing structure for Guam 'mirroring' the provisions of the federal tax code"). Further supporting the proposition that Congress "imposed" the GTIT, Guam cannot substantively change the provisions of the GTIT to be inconsistent with the IRC; yet Congress can make such changes.[5] *See, e.g., Limtiaco v. Camacho*, 549 U.S. 483, 489 n. 2, 127 S.Ct. 1413, 167 L.Ed.2d 212 (2007) ("Guam's territorial legislature cannot redefine terms used in a federal statute," and in particular Guam's Organic Act); *Gov't of Guam v. Koster*, 362 F.2d 248, 252 (9th Cir.1966) ("The United States Commissioner of Internal Revenue may not prescribe any regulations which are not consistent with the federal tax statutes or which add a restriction to a statute which is not justified by statutory language or the intent of Congress. . . . Guam tax officials are similarly limited." (citations omitted)). Although Guam

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[5] We note that, after 1986, Congress authorized Guam to "de-link" from the IRC, thereby allowing Guam to pass its own tax legislation replacing the IRC. *See generally Gumataotao*, 236 F.3d at 1081 (explaining Guam's ability to "de-link"). Guam, however, has not done so, and the mere fact that it *may* "de-link" at a future time does not affect our analysis. Indeed, during oral argument, the Bank stated that simply because Guam *may* "de-link" has "nothing" to do with its arguments on appeal. Oral Arg. 5:18-30.

collects the GTIT, this "was primarily done to relieve the United States Treasury of the necessity of making direct appropriations" and does not change the fact that the GTIT was enacted by, authorized by, and "imposed by" Congress. *See Bank of Am.*, 539 F.2d at 1227-28.

Although addressing tax claims rather than contract claims, the reasoning in *Bank of America* and *Gumataotao* also supports our conclusions. Two years before the Bank began purchasing USGOs, the appellant in *Bank of America* contended that Guam's enactment of a business privilege tax violated 12 U.S.C. § 548, which allowed a local government to tax the net income of a business only once. *Bank of Am.*, 539 F.2d at 1227.[6] It was disputed whether Guam imposed the GTIT by collecting it and therefore whether it violated § 548 by enacting and imposing the business privilege tax in conjunction with the GTIT. *Id.* at 1227. The court found no violation, stating that "there is no dispute that the [GTIT] was enacted by Congress" and therefore "the [GTIT] is not imposed by Guam." *Bank of Am.*, 539 F.2d at 1227-28. Subsequently in *Gumataotao*, the Ninth Circuit not only analyzed many of the same statutes and regulations pertinent to this appeal, but also addressed the nearly identical issue—whether USGOs are exempt from taxation by the GTIT. 236 F.3d at 1077. Ruling that USGOs were not exempt from taxation by the GTIT, the court explained that "Congress, not the local legislature of Guam, imposed the tax on interest from federal bonds." *Id.* at 1082.

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[6] Because § 548 considered Guam a "state," it was not disputed that Guam locally imposed the business privilege tax pursuant to § 548 and that § 548 precluded Guam from locally taxing the net business income twice. *Bank of Am.*, 539 F.2d at 1227 n. 1.

Nor can the various documents offered as parol evidence by the Bank change our holding that the contract between the Bank and the United [sic] does not exempt USGOs from taxation by the GTIT. Because the laws and regulations governing USGOs, and thus the terms of the Bank's express contract, clearly do not exempt USGOs from taxation by the GTIT, such parol evidence cannot be considered to interpret the Bank's contract with the United States. *See, e.g., McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed.Cir.1996) ("[I]f the 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning,' and the court may not resort to extrinsic evidence to interpret them." (citation omitted)).

For the above reasons, we hold that the Bank cannot establish that its express USGO contract with the government included a duty exempting USGOs from taxation by the GTIT. Thus, the government has not breached the USGO contract by imposing the GTIT. We therefore affirm the Court of Federal Claims's dismissal of the Bank's express contract count pursuant to RCFC 12(b)(6).

B.

Having determined that, while there is an express contract between the Bank and the government, it does not contain a duty to exempt the USGOs from taxation by the GTIT, we now turn to the Bank's claim that the government breached a contract implied-in-fact. An implied-in-fact contract requires a "meeting of the minds, which although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding." *Trauma Serv. Group*, 104 F.3d at 1326 (quoting

Hercules Inc. v. United States, 516 U.S. 417, 423-24, 116 S.Ct. 981, 134 L.Ed.2d 47 (1996)); *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed.Cir.1990). In this case, in order to prevail on appeal, the Bank must be able to assert facts that can prove it had an implied-in-fact contract with the government specifically exempting USGOs from taxation *by the GTIT*.

However, "[i]t is well settled that the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter, unless the implied contract is entirely unrelated to the express contract." *Schism v. United States*, 316 F.3d 1259, 1278 (Fed.Cir.2002); *see, e.g., Trauma Serv. Group*, 104 F.3d at 1326; *Atlas*, 895 F.2d at 754-55. Accordingly, because we have determined that the Bank has an express contract with the United States dealing with the pertinent subject matter, we affirm the dismissal of its implied-in-fact contract claims. Indeed, the Bank has admitted both that its purchase of USGOs created an express contract with the government, *see* Bank's Br. 16, and that this contract is "'governed solely' by the regulations" pertaining to USGOs, *see id.* at 23. By explicitly addressing tax exemptions in § 3124 and subjecting the USGOs "to all taxes imposed under the Internal Revenue Code," statutes and regulations clearly contemplate and cover any tax exemptions afforded to USGOs. *See, e.g.*, 31 U.S.C. § 3124; 31 C.F.R. §§ 309.4, 340.3 (addressing taxation and applying the Internal Revenue Code to Treasury bills and bonds). As such, the Bank's implied-in-fact contract claim is foreclosed because "regulations and statutes expressly address" tax exemption of USGOs, and "an 'implied-in-fact contract cannot exist if an express contract already covers the same subject matter.'" *Schism*, 316 F.3d at 1278 (quoting *Trauma Serv. Group*, 104 F.3d

at 1326) (dismissing for failure to state a claim because an express contract foreclosed the possibility of an implied-in-fact contract); *see, e.g., Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343-44 (Fed.Cir.2008) (upholding dismissal of implied-in-fact contract claim for certain costs because the government and the plaintiff entered into an express "cost-share agreement"); *Atlas*, 895 F.2d at 755 (affirming dismissal for failure to state a claim of an implied-in-fact contract for "stabilization costs" because such costs were not "entirely unrelated" to terms of the express contract, which included provisions for costs); *ITT Fed. Support Servs., Inc. v. United States*, 209 Ct.Cl. 157, 531 F.2d 522, 528 (1976) (finding that the existence of an express contract providing for "payment of [plaintiff's] costs and an additional fixed fee for [its] post-termination work" precluded an implied-in-fact contract providing for additional compensation).

For the foregoing reasons, the Bank cannot prove it had an implied-in-fact contract entitling it to the requested relief. We therefore affirm the Court of Federal Claims dismissal of that claim pursuant to RCFC 12(b)(6).

III.

Having affirmed the dismissal of the Bank's express contract and implied-in-fact contract claims, we now address its reformation claim. In order to have a contract reformed, the party seeking reformation under the doctrine of mutual mistake must allege: "(1) the parties to the contract were mistaken in their belief regarding a fact; (2) that mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; and (4) the contract did not put the risk of

the mistake on the party seeking reformation." *Atlas*, 895 F.2d at 750. In order to be entitled to relief, the Bank must be able to show that both parties mistakenly believed specifically that USGOs were exempt from taxation by the GTIT.

Because the Bank cannot prevail on several requisite aspects of its reformation claim, the Court of Federal Claims did not err in dismissing the claim pursuant to RCFC 12(b)(6). First, the Bank has not alleged a mutual mistake of fact that, in this case, can support reformation. Rather, it alleges at most mistake of law with respect to the taxing of interest on USGOs that is contrary to statute and regulation. *See, e.g., William Cramp & Sons Ship & Engine Bldg. Co. v. United States*, 239 U.S. 221, 227, 51 Ct.Cl. 478, 36 S.Ct. 70, 60 L.Ed. 238 (1915) ("[T]he failure of the officers of the claimant company to apprehend the legal effect thereof was not the fault of the United States or its officers, and was not the subject of reformation."); *Snell v. Atl. Fire & Marine Ins. Co.*, 98 U.S. 85, 88, 25 L.Ed. 52 (1878) ("[A] mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts."); *William Cramp & Sons Ship & Engine Bldg. Co. v. United States*, 46 Ct.Cl. 521, 1910 WL 954, *10 (1911) (stating that a contract cannot "be reformed on the ground of mistake arising from ignorance of the law" (citing *Hunt v. Rhodes*, 26 U.S. (1 Pet.) 1, 7 L.Ed. 27 (1828))), *aff'd* 239 U.S. 221, 51 Ct.Cl. 478, 36 S.Ct. 70, 60 L.Ed. 238 (1915).

Also fatal to the Bank's claim is the fact that, even assuming the Bank could show that the government at some point had a mistaken belief about the tax status of USGOs, there is no indication that this alleged mistaken belief "constituted a basic assumption

underlying the contract" about a term that the parties could negotiate. *See Atlas*, 895 F.2d at 750 (requiring a party alleging reformation to show that "the parties recognize[d] the existence of a fact about which they could negotiate"). Specifically, the creation of the contract between the Bank and the government—i.e., purchasing the USGOs—does not involve typical contract negotiations. Rather, as explained above, the Bank simply purchases the USGOs subject to the laws and regulations governing them. Thus, because the parties did not negotiate any terms pertaining to the USGOs, they could not form a mistaken belief about a fact that was subject to negotiations. *See id.* at 752 ("[T]he plaintiffs' allegations of their 'mistake' do not show that they held an erroneous belief concerning a fact whose existence the parties could recognize and about which they could negotiate agreement."). The parties therefore could "not have contemplated the [contract provision at issue] when [they] entered into the contract" and, as a result, the parties "would not have reached an agreement" about exempting USGOs from the GTIT.[7] *Id.*

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[7] It is difficult not to have doubts about the Bank's "mistaken belief" because the Bank admitted that, when it began purchasing the USGOs and thus entered into its "contract," it initially listed the USGOs as taxable. *See* Pl. Mot. for Recon. In other words, the Bank could not have thought that the USGOs were tax free when it began purchasing those USGOs. Thus, although the Bank may currently believe that USGOs are exempt from taxation by the GTIT, this belief did not "constitute[ ] a basic assumption underlying the contract." *See Atlas*, 895 F.2d at 750. Furthermore, in the reformation count in its complaint, the Bank specified that when it purchased the USGOs it mistakenly believed that "Congress did *not* authorize the levy of any [GTIT]" and "that income from such USGOs was free of all taxes by possessions." Bank's Compl. ¶¶ 22, 24. Two

In addition, there is no indication that any alleged "mistaken belief" "had a material effect on the bargain"—i.e., that the contract was entered into because of this mistaken belief. For example, there is absolutely no suggestion that, in return for exempting the Bank's USGOs from taxation by the GTIT, the government required the Bank to pay more for its bonds. Indeed, because the parties did not negotiate and thus did not contemplate the "mistaken belief" at issue, as explained above, any such "mistaken belief" did not have a material effect on the bargain.

For the foregoing reasons, we affirm the dismissal of the Bank's reformation claim pursuant to RCFC 12(b)(6).[8]

IV.

Finally, we see no reason to disturb the Court of Federal Claims's dismissal of the Bank's claim for declaratory relief. The Bank essentially requests, in the event that we interpret its USGO contracts to preclude taxation by the GTIT, a declaration from this court preventing the government from acting contrary to that interpretation. The Court of Federal

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years before the Bank began purchasing the USGOs, however, the law in the Ninth Circuit was clear—the GTIT was imposed by Congress, not a possession. *See Bank of Am.*, 539 F.2d at 1227-28. As such, the Bank's belief that the GTIT was imposed by Guam was simply ignorance of established law, which is insufficient for contract reformation. *See, e.g., Snell*, 98 U.S. at 88; *William Cramp & Sons*, 46 Ct.Cl. 521, 1910 WL 954, at *10.

[8] As we have explained, even assuming that the Bank could show that the government had a mistaken belief, at some point, about the tax status of the USGOs, its reformation claim would fail nonetheless. For this reason, the documents offered by the Bank, which relate solely to the government's alleged mistaken belief, do not change our conclusion.

Claims, and likewise this court, typically declines jurisdiction over this type of relief—requesting a prospective equitable declaration pertaining to contracts that are not yet breached nor require payment of money presently due. *See, e.g., Katz v. Cisneros*, 16 F.3d 1204, 1209 (Fed.Cir.1994) (dismissing declaratory claims for lack of subject matter jurisdiction because "once the propriety of HUD's interpretation of the regulation has been adjudicated it will act accordingly, and any monetary consequences will flow through the contractual scheme"). Regardless, the Bank could only prevail on its declaratory claim if it prevailed on one of its first three contract claims—specifically, the express contract, implied-in-fact contract, and reformation counts. Because we have affirmed the dismissal of all of those claims, however, it is impossible for the Bank to prevail on its request for declaratory relief.

CONCLUSION

In sum, although we disagree with the Court of Federal Claims's decision to dismiss pursuant to RCFC 12(b)(1) the Bank's breach of contract claims with respect to all tax years prior to 2001 and, therefore, reverse that ruling, the Court of Federal Claims properly dismissed all of the Bank's claims on other grounds, as described in this opinion. We therefore affirm the court's ultimate judgment in favor of the government.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 07-32C

BANK OF GUAM,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

March 12, 2008

MEMORANDUM OPINION AND ORDER

CHRISTINE O.C. MILLER, *Judge.*

Since 1978 Bank of Guam ("plaintiff") has purchased and held certain United States Government obligations ("USGOs"), including bonds and Treasury bills from the United States. In 2001 the Guam Department of Revenue and Taxation (the "GDRT") issued a Notice of Deficiency to plaintiff for the tax years 1992, 1993, and 1994 due to plaintiff's failure to pay any Guam Territorial income tax (the "GTIT") on its interest income from USGOs. Plaintiff alleges that the USGOs purchased and held constituted contracts with the United States Government, and that these contracts included a promise that income from the USGOs was "exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States." Compl. in *Bank of Guam v.*

United States, No. 07-32C, ¶ 7 (Fed.Cl. Jan. 17, 2007) (omissions in original). By allowing Guam to collect GTIT on income from the USGOs, plaintiff argues that the United States Government breached these contracts for 1992, 1993, and 1994 tax years, as well as for all preceding years within the statute of limitations.

Pending before the court, following argument before Judge Susan G. Braden and supplemental briefing ordered after the case was transferred, is defendant's motion to dismiss. Defendant argues that jurisdiction is lacking because plaintiff's claims are barred by the applicable six-year statute of limitations. *See* 28 U.S.C. § 2501 (2000). Defendant also questions jurisdiction to hear plaintiff's arguments over allegations pleading the torts of fraudulent misrepresentation or inducement to contract. Defendant's third jurisdictional challenge is that the court cannot entertain plaintiff's demand for declaratory relief, which is predicated not on money presently due, but on contracts that have not yet come into being. Defendant alternatively contests the sufficiency of plaintiff's contract claims, arguing that issue preclusion prevents plaintiff from arguing that the GTIT is a tax imposed by a possession and that plaintiff fails on this issue as a matter of law, in any case.

BACKGROUND

In 1950 Congress enacted the Organic Act of Guam to establish a civil government for Guam, an unincorporated territory of the United States. *See* Organic Act of Guam, Pub.L. No. 630, 64 Stat. 384 (1950) (codified at 48 U.S.C. § 1421 (2000)) ("the Act"). The Act provides that the "income tax laws in force in the United States [including Title 26 of the United States

Code, the Internal Revenue Code] . . . and those which may hereafter be enacted shall be held to be likewise in force in Guam." 48 U.S.C. § 1421i(a) (2000). Congress directed that the "income-tax laws in force in Guam pursuant to subsection (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated that 'Guam Territorial income tax.'" 48 U.S.C. § 1421i(b).[1] Instead of legislating a new tax code for Guam, Congress elected, in effect, to mirror the application of the existing Internal Revenue Code by instituting the GTIT. In this manner tax is collected and disbursed internally by the Government of Guam instead of being remitted to the United States Treasury. For this mirroring to refer to the appropriate entities, when applying the GTIT,

> the applicable provisions of the [Internal Revenue Code] shall be read so as to substitute "Guam" for "United States", "Governor or his delegate" for "Secretary or his delegate", "Governor or his delegate" for "Commissioner of Internal Revenue" and "Collector of Internal Revenue", "District Court of Guam" for "district court" and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

48 U.S.C. § 1421i(e). This process has been referred to as "one-way mirroring." *See Gumataotao v. Dir. of*

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[1] Guam is also authorized to "levy a separate tax on all taxpayers in an amount not to exceed 10 per centum of their annual income tax obligation to the Government of Guam." 48 U.S.C. § 1421i(a). This separately levied tax is not in involved in plaintiff's complaint.

Dep't of Revenue & Taxation, 236 F.3d 1077, 1080 (9th Cir.2001).[2]

The Governor of Guam is charged with "administration and enforcement" of the GTIT. 48 U.S.C. § 1421i(c). "The Governor or his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury, and other United States officials of the executive branch, have with respect to the United States income tax." 48 U.S.C. § 1421i(d)(2). The Governor of Guam has delegated these responsibilities to the GDRT.

The Bureau of the Public Debt of the United States Department of the Treasury is authorized to sell and issue USGOs. *See* 5 U.S.C § 301 (2000); 12 U.S.C. § 391 (2000); 31 U.S.C. § 3102 (2000); *see also* 31 C.F.R. § 356.1 (2007) (regulation governing USGOs from March 1, 1993, to date). Congress exempted USGOs "from taxation by a State or political subdivision of a State," except as specifically authorized. 31 U.S.C. § 3124(a) (2000). Certain treasury regulations also exempt USGOs from taxation imposed by any of the possessions of the United States. *See* 31 C.F.R. § 309.4 (2007) (Treasury bills); 31 C.F.R. § 340.3 (2007) (bonds sold through competitive bidding); 31 C.F.R. § 345.5 (2007) (certain Treasury certificates of indebtedness).

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[2] Because the intent of this statute was to create uniformity between the tax laws of the United States and those of Guam, courts sometimes have substituted in the reverse direction, substituting "United States" for "Guam" where appropriate in order to prevent disparate tax treatment between United States taxpayers and Guam taxpayers. This reverse substitution is referred to as "two-way mirroring." *See Gumataotao*, 236 F.3d at 1080.

FACTS

The following facts are not disputed. In 1978 plaintiff began to purchase USGOs, each stating in boldface print that these securities are "exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States." *See* Compl. ¶ 7 (omissions in original). The USGOs included this statement until 1986, when USGOs were no longer issued in paper form. Thereafter, USGOs have been recorded electronically in book entry form. The terms of sale and issuance are governed by 31 C.F.R. § 356.32 (2007), providing, in relevant part:

> (a) General. Securities issued under this part are subject to all applicable taxes imposed under the Internal Revenue Code of 1986, or its successor. Under section 3124 of title 31, United States Code, the securities are exempt from taxation by a State or political subdivision of a State, except for State estate or inheritance taxes and other exceptions as provided in that section.

31 C.F.R. § 356.32(a). Plaintiff has been required to maintain "account balances in USGOs in amounts that would provide adequate assurances to the [Government of Guam] that its funds deposited at the Bank were not in jeopardy." Compl. ¶ 14.

On January 24, 2001, the Director of the GDRT issued a Notice of Deficiency to plaintiff for the tax years 1992, 1993, and 1994, for GTIT owed in the total amount of $6,886,903.30 on $20,732,620.00 interest earned on United States Treasury bonds owned by plaintiff. On April 24, 2001, plaintiff filed a Verified Petition in the United States District Court

for the District of Guam[3] asserting four claims, seeking relief from the Notice of Deficiency. *See Bank of Guam v. Dir. of Dep't of Revenue & Taxation*, No. 01-CV-16, 2002 U.S. Dist. LEXIS 9662 (D. Guam May 14, 2002).

Before that court was the Director of GDRT's motion to dismiss for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6), the first three of plaintiff's four claims. *See id.* Ruling on plaintiff's first claim, the court held that the "Ninth Circuit's holding in *Gumataotao* directly contradicts [plaintiff's] assertion that the [Director] erred when he determined that Guam could tax the interest income on United States Treasury Bonds." *Bank of Guam*, No. 01-CV-16, 2002 U.S. Dist. LEXIS 9662 at *7. The court granted the Director's motion to dismiss the first claim of plaintiff's petition—that the Director erred in his determination that the GTIT was a tax imposed by Congress. This claim was "not supported by a legally cognizable theory because it is directly contrary to controlling substantive law." *Id.* at *15. However, the court denied the Director's motion to dismiss as to plaintiff's second and third claims. *Id.*

On September 12, 2003, the parties filed with the Guam district court a Stipulated Decision Re Settlement. (Plaintiff submitted a copy of that stipulation to this court post-argument in a filing dated November 30, 2007.) In that document the parties stipulated and agreed

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[3] The United States District Court for the District of Guam has jurisdiction over suits "for the recovery of any Guam Territorial income tax alleged to have been erroneously or illegally assessed or collected" and sits as a tax court for such suits. *See* 48 U.S.C. § 1421i(h)(2) (2000).

> that the issues in this matter have been resolved as follows: [plaintiff] agrees to pay $5,000,000.00, inclusive of any applicable interest, as the deficiency owed . . . for the tax years ending in December of 1992, 1993 and 1994.
>
> The parties further stipulate that the respective concessions made by each party which led to the final resolution of each issue set forth in this Stipulation of Settlement are not to be interpreted as reflecting the view of either party on the merits of each such issue. Moreover, the parties stipulate that such respective concessions, except as otherwise expressly indicated herein, are limited to this proceeding and are not to be interpreted as concessions by either party with respect to any issue in any other proceeding or with respect to any other year.
>
> The parties further stipulate that the Court may enter the foregoing as a decision of the Court in this proceeding. . . .

Stipulated Decision Re Settlement, *Bank of Guam v. Dir. of Dep't of Revenue & Taxation*, 01-CV-16 (D. Guam. filed Sept. 12, 2003), at 1-2; Pl.'s Br. filed Jan. 30, 2007, at Ex. C. Also on September 12, 2003, the Guam district court entered judgment. The substantive text of the judgment, in its entirety, reads: "Judgment is hereby entered in accordance with the Stipulated Decision re Settlement filed September 12, 2003." *Bank of Guam v. Dir. of Dep't of Revenue & Taxation*, 01-CV-16 (D. Guam filed Sept. 12, 2003); Pl.'s Br. filed Jan. 30, 2007, at Ex. D.

On January 17, 2007, plaintiff filed its four-count complaint in the United States Court of Federal Claims. The first count alleges that, because Guam

sought to collect GTIT on income from the USGOs, the United States breached its promise (under statute, regulations, and representations on the face of USGOs) that income from the USGOs would be exempt from taxation imposed by a possession of the United States. The second count seeks reformation of the contract, alleging that both plaintiff and those agencies of the United States that were in charge of the offer, sale, and taxation of USGOs understood that the United States Congress did not authorize the levy of any GTIT on income from USGOs and that this understanding constituted a common and mutual mistake of both parties. Reformation of the contracts would include an obligation requiring the United States to reimburse and indemnify plaintiff for all GTIT that plaintiff has paid to Guam on account of income that plaintiff has realized from the USGOs and all GTIT that it may be required to pay on account of such future income. Plaintiff's third count alleges that the parties' course of conduct created an implied-in-fact contract requiring the United States to reimburse plaintiff in amounts equal to all the GTIT that it has paid, or will hereafter be required to pay, to Guam on account of income that plaintiff has realized from the USGOs. The fourth count alleges that plaintiff expects to continue purchasing and holding USGOs due to various regulatory requirements and seeks a declaratory judgment (1) that all existing and future USGO contracts between the parties must be reformed in the manner sought in the second count, and (2) that the United States Government reimburse plaintiff for any GTIT it pays, or will pay in the future, to Guam on account of income realized from the USGOs.

On April 18, 2007, defendant filed its motion to dismiss plaintiff's complaint for lack of jurisdiction

pursuant to RCFC 12(b)(1), arguing that plaintiff's contract claims are barred by the six-year statute of limitations on actions brought under the Tucker Act, 28 U.S.C. § 1491(a) (2000); its tort claims cannot be heard in this forum; and its demand for declaratory relief is not based on contracts in existence. Pursuant to RCFC 12(b)(6), defendant alternatively moves to dismiss for failure to state a claim upon which relief may be granted, arguing that collateral estoppel attaches to the previous proceeding in which the Guam district court dismissed plaintiff's claim that the GTIT is not a tax imposed by a possession. Defendant's ultimate argument is that plaintiff's contract claims are meritless because the United States Court of Appeals for the Ninth Circuit ruled against arguments identical to plaintiff's in *Gumataotao*, a decision defendant commends as a template for the Court of Federal Claims. Briefing was completed on July 19, 2007.

During argument before Judge Braden on November 19, 2007, the court requested a copy of the Verified Petition in Tax Case before the Guam district court. On November 30, 2007, plaintiff filed that document, as well as the Notice of Deficiency, the Guam district court's original opinion and order, the Stipulated Decision Re Settlement, and the Judgment entered by the Guam district court. *See* Pl.'s Br. filed Nov. 30, 2007, at Exs. A-D.

On December 4, 2007, this case was transferred to the undersigned pursuant to RCFC 40.1(b). Examination of the judgment entered by the Guam district court disclosed that it did not purport to direct entry of judgment for defendant on plaintiff's first claim. On December 7, 2007, the court therefore ordered supplemental briefing regarding the scope and nature

of the judgment entered in *Bank of Guam v. Director of Department of Revenue & Taxation*, 01-CV-16 (D. Guam filed Sept. 12, 2003); Pl.'s Br. filed Jan. 30, 2007, at Ex. D, and its effect on whether issue preclusion forecloses plaintiff from arguing that the GTIT is not a tax imposed by Congress, but one imposed by Guam. *See* Order entered Dec. 7, 2007, at 3. The court rules without further argument. *See* Order entered Feb. 21, 2008.

DISCUSSION

I. *Jurisdiction*

1. *Standard for motions to dismiss under RCFC 12(b)(1)*

The Court of Federal Claims, like all federal courts, is a court of limited jurisdiction. *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461 (Fed.Cir.1998); *see also Sakar Int'l, Inc. v. United States*, 516 F.3d 1340, 1348-50 (Fed.Cir.2008) (referring to United States Court of International Trade). The court's jurisdiction is set forth primarily in the Tucker Act, which confers "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). This grant of jurisdiction constitutes a waiver of sovereign immunity by the United States. "It long has been established, of course, that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399,

96 S.Ct. 948, 47 L.Ed.2d 114 (1976) (omission in original) (quoting *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)). Thus, the Court of Federal Claims has no jurisdiction over a cause of action except to the extent that Congress has waived sovereign immunity. *Id.* Moreover, "in a Court of Claims context . . . , a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Id.* (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969)). Given this construction, the jurisdiction of the Court of Federal Claims extends as far, but only as far, as the United States has consented to suits against it. "The jurisdiction of the Court of Federal Claims is prescribed by the metes and bounds of the United States' consent to be sued in its waiver of immunity." *RHI Holdings*, 142 F.3d at 1461.

Plaintiff bears the burden of proving subject matter jurisdiction. *See Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed.Cir.1998) (plaintiff must establish subject matter jurisdiction by preponderance of evidence). However, in rendering a decision on a motion to dismiss for lack of subject matter jurisdiction, all undisputed factual allegations are presumed to be true. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed.Cir.1988).

2. *Statute of limitations*

Plaintiff properly has alleged a contractual relationship with the United States Government. *See* Compl. ¶¶ 18-20; *see also Berg's Estate v. U.S.*, 231 Ct.Cl. 466, 687 F.2d 377, 377-380 (1982) (bonds are contracts between United States and registered bondholder); *Rotman v. United States*, 31 Fed.Cl. 724, 724 (1994) ("A U.S. Savings Bond is a contract

between the United States and the person to whom it is registered."). Defendant interposes the statute of limitations governing plaintiff's claims, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. Filing a claim within the six-year statute of limitations prescribed in 28 U.S.C. § 2501 is a prerequisite to the court's exercising jurisdiction over a claim. *John R. Sand & Gravel v. U.S.*, __ U.S. __, 128 S.Ct. 750, 757, 169 L.Ed.2d 591 (2008) (reaffirming precedent under principles of *stare decisis* that Tucker Act's statute of limitations is "jurisdictional").

Defendant argues that plaintiff "attributes the cause of liability to an act of the United States Congress"—authorization of the GTIT. Def.'s Br. filed Apr. 18, 2007, at 12. The GTIT was authorized by Congress in 1950 as a part of the Organic Act of Guam establishing the Government of Guam. According to defendant, the authorization of the GTIT was the last—and only—act that the United States Government committed that could give rise to the alleged breach in question. Thus, the six-year statute of limitations would begin running in 1950. Recognizing that plaintiff had not entered into any USGO contracts until 1978, when it began purchasing and holding USGOs, defendant alternatively argues that the statute of limitations began to run in 1978.

Plaintiff would trigger the statute of limitations in 2003, when plaintiff first paid the GTIT to the GDRT as part of its settlement of the lawsuit that plaintiff filed in the Guam district court in 2001. Plaintiff

sees a parallel between the timing of the breach and the situation examined in *Franconia Assocs. v. United States*, 536 U.S. 129, 122 S.Ct. 1993, 153 L.Ed.2d 132 (2002). *Franconia* involved an option allowing contracting parties to prepay government loans entered into in 1979. Congress was concerned about the import of prepayments on the subsidized housing programs that these loans were intended to foster. To this end Congress changed the law several times, notably by passing the Emergency Low Income Housing Preservation Act of 1987, Pub.L. No. 100-242, 101 Stat. 1815 (1988) ("ELIHPA"). ELIHPA, among other objectives, undertook to forestall the borrowers' exercise of their prepayment rights on these loans and thereby to prevent removal of the properties from the low-income housing program. The borrowers in *Franconia* sued the United States in 1997, contending that ELIHPA and other changes in the law had effected a repudiation of their contracts with the Government. The Government countered that the cause of action was a breach which accrued in 1988 upon passage of ELIHPA and that by 1997, when the borrowers sued, the six-year statute of limitations had run.

The Supreme Court held that whether the claims were filed within the six-year statute of limitations was a function of "when the Government breached the prepayment undertaking stated in the promissory notes," because a cause of action for breach of contract accrues, and correspondingly the statute of limitations begins to run, at the time of the breach. *Franconia*, 536 U.S. at 141, 122 S.Ct. 1993. The Court characterized the Government's duty of performance as one "to accept prepayment and execute the appropriate releases," *id.* at 142, 122 S.Ct. 1993, because "[f]ailure by the promisor [the Government]

to perform at the time indicated for performance in the contract establishes an immediate breach." *Id.* at 142-43, 122 S.Ct. 1993. The passage of ELIHPA operated as a "renunciation of a contractual duty *before* the time fixed in the contract for . . . performance." *Id.* at 143, 122 S.Ct. 1993 (internal quotations omitted). In other words, because the time for the Government's performance had yet to arrive, the passage of ELIHPA represented an anticipatory repudiation.

"'An anticipatory repudiation occurs . . . when an obligor communicates to an obligee that he will commit a breach in the future.'" *Id.* at 139, 122 S.Ct. 1993 (quoting *Franconia v. United States*, 240 F.3d 1358, 1363 (Fed.Cir.2001)). A party faced with anticipatory repudiation may elect to treat such repudiation as an immediate breach, or it may choose to wait until the repudiating party actually breaches the contract. *See Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1373 (Fed.Cir.2005). Based on this reasoning, plaintiff urges the court to reject defendant's arguments that plaintiff's claims accrued, and the statute of limitations began to run, in 1950, with the passage of the Organic Act of Guam, or in 1978, when plaintiff began purchasing and holding USGOs. Plaintiff correctly reads the case law. Plaintiff had the option to await action by the United States Government that breached the contracts.

Plaintiff's position that its claims accrued only in 2003 when it paid its settlement to the GDRT, however, cannot be accepted. When the GDRT issued its Notice of Deficiency on January 24, 2001, that demand for payment of the GTIT constituted the breaching act that plaintiff alleges. Before the statute of limitations expired on January 24, 2007, plaintiff

had filed its complaint on January 17, 2007. The passage of the Organic Act of Guam might have effected an anticipatory repudiation with respect to contracts existing at the time. The filing of the Notice of Deficiency in January 2001, in contrast, constituted an actual breach, not an anticipatory repudiation. Plaintiff filed suit within six years of this actual breach. Defendant's motion to dismiss for lack of jurisdiction based on the time bar of the statute of limitations therefore is denied.

3. *Allegations of fraudulent misrepresentation or inducement to contract*

Defendant has objected to a tort claim: "[A]ssuming that the Bank intended to allege that it was the victim of some sort of fraudulent misrepresentation or inducement to purchase USGOs because they were exempt specifically from the GTIT, such a claim would be a tort claim expressly beyond the Court's jurisdiction." Def.'s Br. filed Apr. 18, 2007, at 16-17. Plaintiff rejoins that "[t]he fact is that the Bank has brought a claim for breach of contract, nothing else." Pl.'s Br. filed June 20, 2007, at 12. Defendant's argument is moot.

4. *Declaratory judgment*

Plaintiff's fourth count seeks a declaration of present and future contractual responsibilities. Plaintiff asks this court to declare that the United States Government is obligated to reimburse plaintiff for any GTIT plaintiff pays for income that it realizes from the USGOs purchased under the contract term on the face of the USGOs or the statutory and regulatory representations that such income is free from taxation by the government of Guam. *See* Compl. ¶ 35.

Defendant responds that jurisdiction cannot be based on "anticipatory" claims. *See* Def.'s Br. filed Apr. 18, 2007, at 17-18. Defendant also stands on the proposition that jurisdiction to issue declaratory relief is dependent upon a claim for money presently due.

The Tucker Act confers on the Court of Federal Claims jurisdiction to adjudicate claims for monetary damages against the United States "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The court has jurisdiction to grant equitable relief, primarily in cases involving protests of the government procurement process. *See* 28 U.S.C. § 1491(b)(2); *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1350 (Fed.Cir.2004). The court also can grant limited equitable relief ancillary to claims for monetary relief over which it has jurisdiction. *See* 28 U.S.C. § 1491(a)(2).

Apart from ordering relief under 28 U.S.C. §§ 1491(a)(2) or (b)(2), the Court of Federal Claims has no power to grant a declaratory judgment. *Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed.Cir.1998). The Court of Federal Claims cannot adjudicate a complaint that seeks only declaratory relief. *Id.* at 716-17. *See United States v. King*, 395 U.S. 1, 5, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969) ("In the absence of an express grant of jurisdiction from Congress, we decline to assume that the court of Claims has been given the authority to issue declaratory judgments."). The United States Court of Appeals for the Federal Circuit has reaffirmed that

the Court of Federal Claims lacks jurisdiction to grant declaratory judgments. *See Gonzales & Gonzales Bonds and Ins. Agency, Inc. v. Dep't of Homeland Sec.*, 490 F.3d 940, 944-46 (Fed.Cir.2007).

Because the court cannot grant equitable relief unrelated to a claim for monetary relief pending before the court, *Katz v. Cisneros*, 16 F.3d 1204, 1208 (Fed.Cir.1994), it is not sufficient that the court's decision may affect the disposition of a monetary claim pending elsewhere, or that the court's decision ultimately will enable plaintiff to receive money from the Government. *See King*, 395 U.S. at 4, 89 S.Ct. 1501 ("[C]ases seeking relief other than money damages from the [United States] Court of Claims have never been 'within its jurisdiction.'"). The basic rule that the Supreme Court announced in *King* is the law today and has not been changed by subsequent legislation. *See N.Y. Life Ins. Co. v. United States*, 118 F.3d 1553, 1556 (Fed.Cir.1997), *cert. denied*, 523 U.S. 1094, 118 S.Ct. 1559, 140 L.Ed.2d 792 (1998) (quoting *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002 (1967) ("[I]t is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money.")). Plaintiff's claim for declaratory relief—pleaded in a separate count and not incident to a money claim—cannot be entertained. To the extent that it presumes a money judgment under the first three counts of the complaint, it has been orphaned; the court resolves the motion to dismiss plaintiff's contract claims in defendant's favor.

II. *Motion to dismiss on the merits*

1. *Standards for motions to dismiss under RCFC 12(b)(6)*

Plaintiff alleges that defendant promised that income from the USGOs would be "exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States." Compl. ¶ 7 (omissions in original). The core issue becomes whether the GTIT is actually a tax imposed by Guam, a possession of the United States, as plaintiff argues, or whether the GTIT is a tax imposed by Congress, as defendant argues.

The court's task in considering a motion to dismiss for failure to state a claim is not to determine whether a plaintiff will ultimately prevail, but "'whether the claimant is entitled to offer evidence to support the claims.'" *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 938 (Fed.Cir.2007) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). In *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the United States Supreme Court clarified the standard enunciated in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), with respect to what a plaintiff must plead to survive a Rule 12(b)(6) motion.[4] The Supreme

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[4] The *Conley* standard, abrogated by *Twombly*, stated "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46, 78 S.Ct. 99. *Twombly* retired the literal interpretation of *Conley*'s "no set of facts" language "as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be

Court circumscribed the standard, stating: "'[A]ny statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings.'" *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 n. 4 (Fed.Cir.2007) (quoting *Twombly*, 127 S.Ct. at 1968). Accordingly, the court must assess whether plaintiff adequately states a claim and whether plaintiff can allege any facts that, if proven, would entitle it to the relief sought. *See Twombly*, 127 S.Ct. at 1968-69; *McZeal*, 501 F.3d at 1361-62.

Although plaintiff's factual allegations need not be "detailed," they "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 127 S.Ct. at 1964-65 (internal citation omitted). The court thus "'accept[s] as true all factual allegations in the complaint, and . . . indulge[s] all reasonable inferences in favor of the non-movant,'" to evaluate whether plaintiffs have stated a claim upon which relief can be granted. *Chapman Law Firm*, 490 F.3d at 938 (omission in original) (quoting *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed.Cir.2001)).

2. *Issue preclusion (or collateral estoppel)*

Defendant asserts that issue preclusion, or collateral estoppel, precludes plaintiff from arguing that the GTIT is a tax imposed by Guam, not by Congress. According to defendant, this issue has been resolved in other cases involving other parties in *Bank of America v. Chaco*, 539 F.2d 1226 (9th Cir.1976), and

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supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S.Ct. at 1969.

Gumataotao v. Director of Department of Revenue & Taxation, 236 F.3d 1077 (9th Cir.2001), and that the identical issue was resolved against plaintiff in *Bank of Guam*, No. 01-CV-16, 2002 U.S. Dist. LEXIS 9662, the tax-refund petition that plaintiff filed in the Guam district court.

Often used interchangeably, the terms "issue preclusion" and "collateral estoppel," are considered synonyms, and the trend has been to refer to the denoted doctrine as issue preclusion. *See, e.g., Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 478 n. 1 (Fed.Cir.1991). The older term "res judicata," broadly speaking, encompasses issue preclusion, as well as claim preclusion. *Carson v. Dep't of Energy*, 398 F.3d 1369, 1375 (Fed.Cir.2005). While defendant did not argue claim preclusion, the court rules that the doctrine applies by the express terms of the Stipulated Decision Re Settlement incorporated in the judgment entered by the Guam district court with respect to the three tax years involved in that lawsuit.

Four prerequisites must be met before the doctrine of issue preclusion can be applied to preclude a party from rearguing a particular issue in an ongoing litigation: "'(1) identity of the issues in a prior proceeding; (2) the issues were actually litigated; (3) the determination of the issues was necessary to the resulting judgment; and, (4) the party defending against preclusion had a full and fair opportunity to litigate the issues.'" *In re Trans Tex. Holdings Corp.*, 498 F.3d 1290, 1297 (Fed.Cir.2007) (quoting *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1365-66 (Fed.Cir.2000)). No dispute exists that the issue before the Guam district court was whether the GTIT is a tax imposed by Guam or by Congress, nor is it

disputed that this issue is identical to the one that plaintiff now brings before the court. Plaintiff cannot dispute that it had a full and fair opportunity to litigate the issue, nor that it was well represented by counsel throughout the prior litigation. While this issue was actually litigated, the parties do dispute to what extent the issue was determined beyond tax years 1992, 1993, and 1994 and whether a resulting judgment ever entered.

In *Bank of Guam*, 2002 U.S. Dist. LEXIS 9662, the Guam district court held that the Director of the GDRT did not err in determining that the GTIT was a tax imposed by Congress, not a tax imposed by Guam, and that income from plaintiff's USGOs was subject to the GTIT. *Id.* at *7. The court granted the Director's motion to dismiss with regard to this first claim of plaintiff's petition. It held that this count was "not supported by a legally cognizable theory because it is directly contrary to controlling substantive law." *Id.* at *15 (citing to *Gumataotao*, 236 F.3d 1077). While the district court granted the Director's motion to dismiss with respect to plaintiff's first claim, it denied the motion with respect to the remaining two claims—(1) whether the Director was equitably estopped from assessing the tax due to representations to the contrary and (2) whether retroactive application of a court decision might constitute an abuse of discretion. For that reason the litigation continued. While the Guam district court issued an opinion and order dismissing plaintiff's first claim, it did not enter judgment because the litigation was ongoing.[5] The final judgment of Septem-

[5] In this circuit, as well as others, there is a general policy disfavoring interlocutory review of trial court determinations

ber 12, 2003, was entered pursuant to a stipulated settlement. The judgment reads, in its entirety: "Judgment is hereby entered in accordance with the Stipulated Decision re Settlement filed September 12, 2003." *Bank of Guam*, 01-CV-16; Pl.'s Br. filed Jan. 30, 2007, at Ex. D.

Defendant argues that the issue of whether the GTIT is a tax imposed by Guam or by Congress was actually litigated and that the determination of this issue was necessary to the resulting judgment. Indeed, defendant contends that the grant of the Director's 12(b)(6) motion to dismiss itself operates as a judgment. *See* Def.'s Br. filed Jan. 17, 2008, at 5 ("[D]ismissal under . . . 12(b)(6) is a judgment on the merits." (quoting *Pedrina v. Chun*, 906 F.Supp. 1377, 1401 (D.Haw.1995) (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n. 3, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981)))). Defendant misunderstands the import of *Federated Department Stores*. While the Supreme Court observed that "dismissal for failure to state a claim" is a "'judgment on the merits,'" 452 U.S. 394, 399 n. 3, 101 S.Ct. 2424, 69 L.Ed.2d 103, it held only that 12(b)(6) motions address the

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> because such review results in piecemeal treatment of litigation. Intermediate appeals disrupt and delay proceedings at the trial level. From the perspective of the reviewing court, interlocutory appeals may require decisions without the full factual and legal context. Furthermore, it can result in the waste of judicial resources in deciding issues which are subsequently rendered moot.

Allied Materials & Equip. Co. v. United States, 223 Ct.Cl. 657, 659, 1980 WL 13149 (1980); *see* Fed.R.Civ.P. 54(b) (providing for "the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay").

merits of a claim. By extension, any judgment entered pursuant to a 12(b)(6) dismissal operates as a judgment on the merits. The Guam district court did not enter judgment pursuant to Fed.R.Civ.P. 54(b), *see supra* note 5, at the time it issued its opinion and order granting the Director's 12(b)(6) motion with respect to plaintiff's first claim or at any time thereafter. The court did not direct entry of judgment on this claim or incorporate its earlier ruling when it ordered entry of judgment on the claims that were settled per the stipulation. The only judgment entered in that case was pursuant to the stipulated settlement agreement between plaintiff and the Director, and the stipulation did not purport to settle claims other than for the three tax years in suit.

The language of the stipulated settlement contemplated only that plaintiff would pay $5,000,000.00 as the deficiency for the tax years in suit and that the "respective concessions made by each party which led to the final resolution of each issue . . . . *are limited to this proceeding and are not [to] be interpreted as concessions by either party with respect to any issue in any other proceeding or with respect to any other year.*" Stipulated Decision Re Settlement, *Bank of Guam v. Dir. of Dep't of Revenue & Taxation*, 01-CV-16 (D. Guam. filed Sept. 12, 2003) at 1-2 (emphasis added); Pl.'s Br. filed Jan. 30, 2007, at Ex C. Because the judgment was restricted to the terms of the stipulation, and the stipulation self-referenced as the "decision" in the case, a final judgment dismissing plaintiff's first count never entered. Plaintiff also emphasizes that the Guam district court did not make findings of fact or conclusions of law, that the case was never tried, and that there was no opportunity to appeal.

Plaintiff cites *United States v. International Building Co.*, 345 U.S. 502, 73 S.Ct. 807, 97 L.Ed. 1182 (1953), in which the Supreme Court considered the effect of entry of formal decisions pursuant to a stipulated agreement. In that case the United States Tax Court "held no hearing; no stipulations of fact were entered into; no briefs were filed or argument had." *Int'l Building Co.*, 345 U.S. at 504, 73 S.Ct. 807. The Supreme Court held that

> the decisions entered by the Tax Court . . . were only a pro forma acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence . . . that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by that court. They may or may not have been agreed upon by the parties. Perhaps, as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason, for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration. *Certainly the judgments entered are res judicata of the tax claims for [the relevant years], whether or not the basis of the agreements on which they rest reached the merits.* But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. Estoppel by judgment includes matters in a second proceeding which were

> actually presented and determined in an earlier suit . . . . *A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case*, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties.

Id. at 505-06, 73 S.Ct. 807 (emphases added). The situation in *International Building* is not identical to the case at bar. The Guam district court ruled on the Director's motion to dismiss and determined the issue concerning the characterization of the tax. However, that ruling was not entered as a final judgment and the parties' stipulation did not indicate that the ruling was involved in the agreement to settle or incorporated in the stipulation. Indeed, the stipulation recited that the stipulation itself was the "decision" and that no concession on the merits had been made other than those in respect of the three tax years in suit. The situation thus is sufficiently similar such that the Supreme Court's reasoning leads to the same holding in the case at bar.

Entry of judgment demarcates finality from orders that do not have consequences that foreclose a party's rights to appeal. A federal court must be zealous to adhere to the requirements of its rules that either judgment enter on all claims or that judgment enter on fewer than all claims upon an express finding and direction. *See* Fed.R.Civ.P. 54(b); RCFC 54(b). The Federal Circuit recently observed that a stipulation for judgment must be restricted to its terms. *See Doe v. United States*, 513 F.3d 1348, 1352 (Fed.Cir.2008) (interpreting judgment intended to reflect parties' stipulation narrowly). The judgment entered by the

Guam district court pursuant to the stipulated agreement between plaintiff and the Director of the GDRT cannot serve to preclude plaintiff from arguing the issue of whether the GTIT is imposed by Guam or by Congress with respect to tax years that the stipulation and judgment do not bar. As in *International Building*, the claim preclusion element of res judicata is decisive for the tax years covered by the stipulation, 1992, 1993, and 1994. *See* Stipulated Decision Re Settlement, *Bank of Guam*, 01-CV-16, at 1-2; Pl.'s Br. filed Jan. 30, 2007, at Ex. C ("[T]he issues in this matter have been resolved as follows: [plaintiff] agrees to pay $5,000,000.00, inclusive of any applicable interest, as the deficiency owed . . . *for the tax years ending in December of 1992, 1993 and 1994*." (emphasis added)). The only decision rendered and entered was the "Stipulated Decision." *See id.* ("The parties further stipulate that the Court may enter the foregoing as a decision of the Court in this proceeding. . . .") Because plaintiff saved the same argument for another day, the court turns to the three contract claims set forth in plaintiff's complaint.

3. *Breach of express or implied contract*

The core issue remains whether the GTIT is actually a tax imposed by Guam, a possession of the United States, as plaintiff argues, or whether the GTIT is a tax imposed by Congress, as defendant argues. Plaintiff views each of the USGOs that plaintiff purchased as a separate contract between plaintiff and the Government. The core promise in this contract was that income from the USGOs was "exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States." Compl. ¶ 7 (omissions in original). Plaintiff has been inconsistent, however, in characterizing the

nature of the promise. *Compare* Compl. ¶ 7 ("exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States." (omissions in original)) *with* Pl.'s Br. filed June 20, 2007, at 21 ("[plaintiff] alleges that [d]efendant *promised in its contracts that there would be no territorial tax on USGO income*").

The thrust of plaintiff's argument is that the United States Government promised that income from the USGOs would be exempt from taxation imposed by any of the possessions of the United States. If the GTIT is, as defendant argues, a tax imposed not by Guam but by the United States Congress, the GTIT does not constitute taxation imposed by a possession of the United States, and the levy of the GTIT on income from the USGOs purchased and held by plaintiff cannot constitute breach of an express or implied-in-fact contract.

The Federal Circuit has not had occasion to address the GTIT at all, let alone whether it is a tax imposed by Guam or by Congress. The United States Court of Appeals for the Ninth Circuit, the court that hears appeals from the United States District Court for the District of Guam, has decided at least two cases involving this issue. *Gumataotao v. Dir. of Dep't of Revenue & Taxation*, 236 F.3d 1077 (9th Cir.2001); *Bank of Am. v. Chaco*, 539 F.2d 1226 (9th Cir.1976). While the holdings of the regional circuits are not binding authority on the Court of Federal Claims, the Federal Circuit considers them persuasive authority that can be instructive or helpful. *See, e.g., Summit Tech. Inc. v. Nidek Co.*, 435 F.3d 1371, 1376 (Fed.Cir.2006) (when attempting to determine a circuit law on issue never addressed by that circuit, holdings of other regional circuits instructive);

Teva Pharm. USA, Inc. v. Pfizer Inc., 405 F.3d 990 (Fed.Cir.2005) (when addressing case or controversy requirements, approach of sister circuits considered).

In *Bank of America*, the Ninth Circuit addressed a statutory restriction on the manner in which the States could tax national banking associations located within their limits. The statute limited the imposition of tax by a State to one of four taxation schemes, including allowing the States to "tax such associations on their net income" or tax "according to or measured by their net income." *Bank of Am.*, 539 F.2d at 1227 (internal quotations omitted). The statute also provided that the "imposition by any State of any one of the above four forms of taxation shall be in lieu of the others" and that "Guam is considered a State for the purpose of this Act." *Id.* (internal quotations omitted).

Because it was compelled to pay a 4% net profits tax imposed by the Government of Guam as a business privilege tax, Bank of America complained that the imposition of the GTIT violated the provisions of the statute that limited States (or Guam) to one form of taxation in lieu of all others. The Ninth Circuit recognized that, "[a]lthough there is no dispute that the Guam territorial income tax was enacted by Congress," the issue for resolution was "whether or not it is nevertheless to be considered an imposition by the Government of Guam for the purposes of" the statute at hand. *Id.* The court characterized the tax as "a territorial income tax mirroring the provisions of the federal tax code." *Id.* While "tax is collected by the Government of Guam for its own use in lieu of direct appropriations from the United States Treasury," the GTIT was organized in this fashion "primarily to relieve the United States Treasury of the

necessity of making direct appropriations." *Id.* The Ninth Circuit concluded that "[A]lthough Congress has delegated the collection and enforcement functions to the Government of Guam, the latter is powerless to vary the terms of the federal income tax laws as applied to Guam, except as permitted by Congress." *Id.* at 1227-28. The holding followed that "the Guam territorial income tax is not a tax imposed by Guam for the purposes" of the statute that prohibited duplicative taxation of national banking associations by States or by Guam. *Id.*

The *Gumataotao* decision is even more directly on point with, if not identical to, the issue presented by plaintiff's complaint. Mr. Gumataotao was a Guam resident who received a substantial amount of interest income from United States bonds. In filing his GTIT returns, he reported that the interest from those United States bonds was non-taxable, and he did not pay tax on that income. Just as in this case, the Director of the GDRT issued a deficiency notice to Mr. Gumataotao, and, just as in this case, Mr. Gumataotao filed a petition in the Guam district court seeking a redetermination of his tax liability. *Gumataotao* 236 F.3d at 1078-79. Mr. Gumataotao's argument, as characterized by the Ninth Circuit, could be viewed as consisting of four propositions, three of which are relevant to the case at bar:

> [1)] As a possession of the United States, Guam cannot constitutionally tax a U.S. bond because the federal government has not "explicitly consented" to such a tax. [2)] Title 31 U.S.C. § 3124(a), which precludes states from taxing the interest on federal bonds, prevents Guam from taxing U.S. bonds. [3)] Allowing Guam to tax

> U.S. bonds is "manifestly inapplicable or incompatible" with Congressional intent.

Id. at 1079. The Ninth Circuit rejected each of Mr. Gumataotao's arguments.

Mr. Gumataotao argued "that it is unconstitutional for Guam, a possession of the United States, to tax an instrumentality of the federal government." *Id.* at 1081. The Ninth Circuit discounted the argument "for one simple reason: Guam did not pass any law purporting to tax the federal bonds, Congress did." *Id.* Congress employed one-way mirroring to avoid "the arduous task of writing an entirely new tax code for the possession of Guam." *Id.* Thus, because "it was Congress, in [26 U.S.C.] § 61(a)(4), that taxed the interest from U.S. bonds," and because "it was Congress that applied the provisions of the I.R.C. to Guam taxpayers" through the one-way mirroring of 48 U.S.C. §§ 1421i(a), (d), (e), the GTIT was a tax imposed by Congress, not by Guam. *Gumataotao*, 236 F.3d at 1081.

Mr. Gumataotao also argued that 31 U.S.C. § 3124 (2000), exempts the interest paid on USGOs from the GTIT. This argument is identical to plaintiff's. The statute provides that "[s]tocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State." *Id.* The parties in *Gumataotao* initially disputed whether Guam is a "State" for the purposes of 31 U.S.C. § 3124. Even assuming that Guam was a "State" for the purposes of the statute, the Ninth Circuit ruled that the provision is irrelevant because the GTIT is a tax imposed by Congress, not by the legislature of Guam. *Gumataotao*, 236 F.3d at 1082.

Finally, Mr. Gumataotao argued that allowing the GTIT to reach income from interest on USGOs would be "'manifestly inapplicable or incompatible' with Congressional intent in passing the Income Tax Section," given that Congress's intent was "for the [GTIT] to be treated as a separate Territorial tax, and that to permit such taxation [of USGOs] would be treating the [GTIT] not as a separate territorial tax," but as a federal tax. *Id.* (internal quotations omitted). The Ninth Circuit noted that Mr. Gumataotao misunderstood Congressional intent, which was "to provide uniform tax treatment for U.S. and Guam taxpayers." *Id.* (citing *Sayre & Co. v. Riddell*, 395 F.2d 407, 410 (9th Cir.1968)). According to the court, "allowing Guam to tax the interest from federal bonds would not 'severely frustrate' the intent of Congress to promote uniform tax treatment between U.S. and Guam taxpayers." *Id.*

This court agrees with the Ninth Circuit's reasoning in *Gumataotao* and *Bank of America*. The GTIT was established to provide a tax structure that applied to Guam residents that mirrored the Federal Internal Revenue Code without having to enact and implement a new tax code. The Governor of Guam was given authority to collect the GTIT for ease of administration, saving Congress from having to make appropriations for Guam's use and saving the IRS from having to engage in tax collection in the South Pacific. While Guam has been given the authority to unlink its tax structure from the mirroring of the GTIT, *see* Tax Reform Act of 1986, §§ 1271, 1277(b), Pub.L. No. 99-514, 100 Stat. 2085 (1986), "until and unless it does so, it was Congress, not the Guam government, that imposed a tax on U.S. bonds." *Gumataotao*, 236 F.3d at 1081; *see Bank of Am.*, 539 F.2d at 1227.

Income earned on USGOs is subject to federal income tax imposed by Congress; because the GTIT, imposed by Congress, is a mirror of the federal income tax, income earned on USGOs is likewise subject to the GTIT. While the GTIT is collected by Guam, it is not imposed by Guam, but by Congress. Therefore, the imposition of the GTIT cannot constitute a breach of either an express or implied contract, as plaintiff alleges. Defendant's motion to dismiss is granted with respect to plaintiff's first count, for breach of express contract, and plaintiff's third count, for breach of an implied-in-fact contract.

4. *Reformation*

In the second count of its complaint, plaintiff alleges that, at all times prior to the *Gumataotao* decision, both the United States Government and plaintiff understood that Congress did not authorize the imposition of any GTIT on income realized from USGOs purchased by plaintiff and that this understanding was a mutual and reasonable mistake. Mutual mistake requires reformation of all the contracts pertaining to USGOs purchased by plaintiff. *See* Compl. ¶ 23. Plaintiff seeks reformation of the contracts to include an obligation requiring the United States to reimburse and indemnify plaintiff for all GTIT that plaintiff has paid to Guam on account of income that plaintiff has realized from the USGOs and all GTIT that plaintiff may be required to pay on account of such future income. *Id.*

Reformation of a written agreement on the ground of mutual mistake is an extraordinary remedy and is available only upon presentation of satisfactory proof of four elements:

> (1) the parties to the contract were mistaken in their belief regarding a fact; (2) that mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; and (4) the contract did not put the risk of the mistake on the party seeking reformation.

Atlas Corp. v. United States, 895 F.2d 745, 750 (Fed.Cir.1990).

Because it does not allege a common mistake of fact between the parties, the complaint does not plead mutual mistake. The complaint does not allege that the United States Government, at any time, has acted to exempt entirely income earned from USGOs from the GTIT. Plaintiff's complaint alleges only that the Government has represented that USGOs were exempt from taxation imposed by a possession. *See* Compl. ¶ 7 ("[T]he Bank purchased a number of USGOs that stated in boldface print that they were 'exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States.'"). Reformation is not an available remedy, and defendant's motion to dismiss is granted with respect to plaintiff's second count.

CONCLUSION

Plaintiff alleges that the United States Government undertook the obligation to exempt income realized from the USGOs plaintiff purchased from taxation imposed by any of the possessions of the United States. The GTIT is a tax imposed by Congress, not a tax imposed by Guam or any possession of the United States. The Government has not breached the contracts it entered into with plaintiff

covering tax years pleaded in the complaint. Accordingly, based on the foregoing,

IT IS ORDERED, as follows:

1. Defendant's motion to dismiss pursuant to RCFC 12(b)(1) is granted with respect to all tax years prior to 2001 and the fourth count of plaintiff's complaint and otherwise is denied.

2. Defendant's motion to dismiss pursuant to RCFC 12(b)(6) is granted with respect to the first, second, and third counts of plaintiff's complaint.

3. The Clerk of the Court shall dismiss the complaint as to all tax years prior to 2001 and as to plaintiff's claim for declaratory relief (the fourth count) without prejudice for lack of subject matter jurisdiction. The Clerk of the Court shall enter judgment dismissing the complaint as to all claims for breach of contract and reformation (the first, second, and third counts).

IT IS SO ORDERED.

APPENDIX C

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-5078

BANK OF GUAM,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 07-CV-032, Judge Christine O.C. Miller.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 28, 2009.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 12/18/2009

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

[Filed Jan. 17, 2007]

Case No: 07-32C

BANK OF GUAM,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

1. This Court has jurisdiction over this claim against the United States pursuant to 28 U.S.C. section 1491.

2. Plaintiff Bank of Guam, sometimes referred to as "the Bank," is a corporation organized under the banking laws of the Territory of Guam with its principal place of business in Hagåtña, Guam.

3. Defendant is the United States government, acting through the various agencies involved in the issuance of certain United States government obligations ("USGOs") that were purchased by the Bank, and by enacting the authority for the United States possession of Guam, also called the Territory of Guam (see 48 U.S.C. sec. 1421a), to tax the income from such USGOs.

4. For more than a century, the United States has sold USGOs to the public. The USGOs are negotiable instruments. USGOs trade actively, conti-

nuously, and with great liquidity and little risk as long as the United States' covenants about them are performed. At all times relevant to this proceeding, the United States government has sold those instruments on terms which included the covenant that the income received from the USGOs may not be taxed by a possession of the United States, and has so provided in its regulations and offering circulars pertaining thereto.

5. Beginning in or about 1978, the Bank purchased, and it continues to purchase, various United States bonds, notes, treasury bills and other USGOs which had been issued by the United States government and in particular, by the Bureau of the Public Debt in the United States Department of the Treasury. The Bank has been and is now the owner, transferee, holder, holder in due course, and/or bona fide purchaser for value (collectively, the "owner") of such USGOs.

6. For many years commencing in or about 1978, the Bank purchased USGOs and then held them after purchase, receiving interest income from those investments. Each such purchase was of an obligation issued by the United States government, which had made certain representations and commitments with respect to such obligations. Each such obligation was a contract between the United States government and the owners of such USGOs (hereinafter collectively referred to as "USGO contracts"), both in the sense that all owners of such obligations, such as the Bank, were intended third party beneficiaries of such contracts and in that each such obligation was and is a negotiable instrument, and that therefore the promises of the United States government to the original purchasers ran in favor of the instruments'

owners or holders such as the Bank. In every such instance, it was an integral term of the contract that the income from USGOs would be free of any taxation by any possession of the United States, including the Territory of Guam.

7. Commencing in or about 1978, the Bank purchased a number of USGOs that stated in boldface print that they were "exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States." More recently, since about 1986, USGOs have not been issued in paper form but were recorded electronically in book entry form. The printed legend disappeared from those later issues, but the United States continued to commit through the Code of Federal Regulations, whose provisions are incorporated in all USGO contracts, that the same tax-exempt status of USGOs continued. Thus, the USGO obligations issued after 1986 and purchased by the Bank continued to contain and still contain the United States government's covenant that the income from such USGOs is free of any Territorial taxation.

8. In purchasing USGOs, the Bank relied at all times on these contract terms and commitments as well as on the United States government's representations, both of which were to the effect that income from USGOs would not be subject to the Guam Territorial income tax.

9. Over the years since about 1978, through various audits, investigations, correspondence and inquiries, the Guam Territorial government sought confirmation and directions at various times and from time to time from offices of the United States government at its headquarters in Washington, D.C., including, among others, the Internal Revenue Ser-

vice, as to whether income from such USGOs was subject to the Guam Territorial income tax. In every instance of which Plaintiff is aware, the agencies at the headquarters of the United States government, including the Internal Revenue Service, confirmed to the Guam Department of Revenue and Taxation ("GDRT") that income from such USGOs was not subject to the Guam Territorial income tax. Those confirmations were generally and specifically known by the Bank, which relied on them in continuing to purchase and to hold USGOs.

10. In January, 2001, the United States Court of Appeals for the Ninth Circuit held that income from USGOs was indeed subject to the Guam Territorial income tax, and that such tax was imposed not by the government of the Territory of Guam, which assessed such tax and to which such tax must be paid, but rather by the United States Congress. *Gumataotao v. Dir. of Dep't of Revenue and Taxation*, 236 F. 3d 1077 (9th Cir. 2001). The United States government is the authority under which the income from USGOs is now taxed by the government of the Territory of Guam, a possession of the United States (*see* 48 U.S.C. sec. 1421a). Without authority from the United States government, the Guam territorial government would be unable to impose the Territorial income tax described in this Complaint. The Bank was not a party to the *Gumataotao* case.

11. Within days after the Ninth Circuit's *Gumataotao* decision, the GDRT issued a notice of deficiency to the Bank for the tax years 1992, 1993 and 1994, all pertaining to the Bank's failure to pay any Guam Territorial income tax on its income from USGOs.

12. The Bank commenced litigation against the GDRT, challenging the authority of the Guam Territorial government to tax the Bank's income from USGOs. In 2003, the Bank settled that litigation by paying a $15 million tax deficiency to the Guam Territorial government with respect to the Bank's income from USGOs for all open tax years through and including 2001. The Bank based its decision to settle on the *Gumataatao* precedent, which governed all courts within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, including the United States District Court for the Territory of Guam. That controlling decision made it pointless for the Bank to maintain the litigation against the GDRT.

13. The United States government, through its Congress, breached the contract terms, representations and promises contained in all of the Bank's USGOs that income from USGOs would be free of the Guam Territorial income tax, by authorizing the imposition of the Guam territorial income tax thereon.

14. At the time of the *Gumataotao* decision and at all times since, the Bank had a substantial business relationship with the Guam Territorial government, whereby the Territorial government maintained large deposit balances in its accounts at the Bank. Pursuant to certain government regulations, it was a condition of the maintenance of certain of such deposits at the Bank that the Bank must maintain account balances in USGOs in amounts that would provide adequate assurances to the Guam Territorial government that its funds deposited at the Bank were not in jeopardy.

15. At the time of the *Gumataotao* decision and at all times since, and as a consequence of the commitments and obligations described in the preceding

paragraph, it was impracticable for the Bank to divest itself fully of its investments in USGOs. Accordingly, the Bank has continued to purchase USGOs and to hold them in its investment portfolio since the issuance of the *Gumataotao* decision.

16. The income from all of the USGOs described in the preceding paragraphs was, and it continues to be, represented by the United States government as being free of taxation by its possessions, including the Territory of Guam.

17. Since the settlement described at paragraph 12 above, the Bank has paid additional Guam Territorial income taxes to the government of Guam on all of the income it has earned from USGOs. The amount so paid is in excess of $ 2.3 million as of the date of this Complaint and is continually increasing from tax period to tax period. For the reasons alleged at paragraphs 14 and 15 above, it is impracticable for the Bank to alter its investment strategy so as to avoid paying Territorial income taxes on such USGO income to the government of Guam pursuant to the *Gumataotao* decision. Therefore, the Bank will continue to purchase and hold such USGOs and to pay Territorial income taxes on the income derived therefrom to the government of the Territory of Guam.

FIRST CLAIM

(BREACH OF CONTRACT)

18. Plaintiff incorporates in this First Claim all of the allegations of paragraphs 1 through 17 above, as if the same were herein fully set forth.

19. The United States government has breached its contractual obligation that the income from USGOs

shall be free of the Guam Territorial income tax; and its representation to that effect has proved to be false.

20. As a direct and proximate result of the United States government's breach of contract, the Bank has suffered actual damages as follows:

(a) $15 million, which it paid to the government of the Territory of Guam as Guam Territorial income taxes on its income from USGOs pursuant to the settlement described at paragraph 12 above;

(b) An amount according to proof, but in excess of $2.3 million, consisting of income taxes the Bank has paid to the Territory of Guam on the income from such USGOs for tax years commencing in 2002;

(c) Interest on the above items as provided by law; and

(d) Further amounts according to proof at the trial.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

SECOND CLAIM

(REFORMATION)

21. Plaintiff incorporates in this Second Claim all of the allegations of paragraphs 1 through 17, 19 and 20 above, as if the same were herein fully set forth.

22. At all times prior to the *Gumataotao* decision, both the Bank and those agencies of the United States government which were in charge of the offer, sale and taxation of USGOs understood that the acts of the United States Congress did *not* authorize the levy of any Guam Territorial income tax on income from USGOs. At all those times, this understanding was a mutual and reasonable mistake by both

parties, was a critical term of the USGO contracts, and was a decisive reason for the Bank to purchase the USGO contracts.

23. This common and mutual mistake of both parties requires reformation of all of the USGO contracts purchased by the Bank during that period, so as to place on the United States government the financial burden of the Guam Territorial income taxes that the Bank paid to the Guam Territorial government on account of the income the Bank realized from its investments in USGOs. To do so, the United States should be required to reimburse the Bank for all such taxes, with interest as provided by law.

24. Following the *Gumataotao* decision, the United States government continued to represent to the buyers and owners of USGOs, including the Bank, that the income from such USGOs was free of all taxes by possessions of the United States such as the Territory of Guam, and so represents to this day. Because of the strictures on its business operations described in paragraphs 14 and 15 above, the Bank has continued to purchase USGOs and is likely to do so in the future.

25. The Bank's decision to continue purchasing USGOs after *Gumataotao* was influenced in part by the fact that, notwithstanding *Gumataotao*, the United States government continued and still continues to represent to the public, including the Bank, that the income from USGOs was and is free from taxes payable to Guam, which is a covenant the United States government could readily perform but has not implemented, and by the Bank's reliance on the integrity and good faith of the United States government's representation to that effect. That

reliance was reasonable because the United States government had and has within its means both the power to cause the Guam Territorial income tax on such income not to be collectible, and conversely the power to state plainly that income from the USGOs *would* thereafter be subject to the Guam Territorial income tax. Because the representation that the income from the USGOs continues to be free of Territorial taxation is still contained in the regulations adopted by the United States Department of Treasury, it continues to be an integral part of the USGO contracts. These circumstances, too, require reformation of all of the USGO contracts purchased by the Bank after the *Gumataotao* decision, in the same manner as described at paragraph 23 above.

26. This Court should reform all of the USGO contracts between the parties so as to cause them to contain an obligation on the part of the United States government, requiring it to reimburse and indemnify the Bank for all the Guam Territorial income taxes the Bank has paid to the Guam Territorial government on account of the income that the Bank has realized from its investments in USGOs and which it may be required to pay to the Guam Territorial government on account of such income hereafter.

27. As so reformed, the contracts should require the United States government to reimburse the Bank in amounts equal to all the Guam Territorial income taxes the Bank has paid and will hereafter be required to pay on account of the income that the Bank has realized and will hereafter realize from its investments in USGOs, together with interest on all sums so paid as provided by law.

28. The United States government is in breach of the thus reformed contracts, and the Bank has been

damaged by such breach in amounts according to proof.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

THIRD CLAIM

(IMPLIED CONTRACTS)

29. Plaintiff incorporates in this Third Claim all of the allegations of paragraphs 1 through 17, 19, 20, and 22 through 28 above, as if the same were herein fully set forth.

30. As shown by the parties course of conduct alleged above, at all times relevant hereto there existed, and there continue to exist, contracts implied in fact between the Bank and the United States government as to each USGO purchased by the Bank, by which the United States government is obligated to reimburse the Bank for any sums it has paid, or may hereafter be required to pay, to the government of the Territory of Guam as Guam Territorial income taxes on the income that the Bank has realized and will hereafter realize from its ownership of such USGOs. With respect to each USGO purchased by the Bank, there was such an implied-in-fact contract between the parties in that there was mutuality of intent to contract, consideration, lack of ambiguity in offer and acceptance, and actual authority to bind the United States government.

31. The implied contracts, and each of them, require that the United States government reimburse the Bank in amounts equal to all the Guam Territorial income taxes the Bank has paid, or will hereafter be required to pay, to the Guam Territorial government on account of income that the Bank has realized or

will hereafter realize from its investments in USGOs, together with interest thereon as provided by law.

32. The United States government is in breach of the thus implied contract terms, and the Bank has been damaged by such breach in amounts according to proof.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

FOURTH CLAIM

(DECLARATORY RELIEF)

33. Plaintiff incorporates in this Fourth Claim all of the allegations of paragraphs 1 through 17, 19, 20, 22 through 28, and 30 through 32 above, as if the same were herein fully set forth.

34. Because of the facts and circumstances alleged above, the Bank expects to continue to purchase and hold USGOs as to which the United States government has represented and continues to represent that the income from them is free from any obligation to pay Guam Territorial income taxes to the government of the Territory of Guam.

35. The Bank requires a declaration from this Court that such representations do and will breach the present and future USGO contracts between the parties, that such contracts must be reformed in the manner described at paragraphs 23 and 25 above, and that the United States government must reimburse the Bank for any Guam Territorial income taxes the Bank pays, or will pay hereafter, to the government of the Territory of Guam on the income from USGOs that the Bank now holds and may purchase hereafter.

WHEREFORE, Plaintiff Bank of Guam prays for judgment against Defendant United States of America as follows:

1. For damages according to proof, but not less than $17,300,000.00, together with interest thereon as provided by law, and for its reasonable attorneys' fees.

2. For reformation of all USGOs and USGO contracts between the parties, so as to insert therein the term that the United States government is required to reimburse the Bank for any and all Guam Territorial income taxes heretofore or hereafter paid by the Bank to the government of the Territory of Guam with respect to the Bank's income from USGOs.

3. For a declaration that the United States government is obligated to reimburse the Bank on a forward basis for all sums which the Bank will hereafter be obliged to pay to the government of the Territory of Guam as Guam Territorial income taxes on income the Bank realizes from USGOs that it purchases under the contract term or the representation that the income therefrom is free from taxation by the government of the Territory of Guam.

4. For such other and further relief as may be just in the premises.

Dated: January 12, 2007

/s/ KURT W. MELCHIOR

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APPENDIX E
SAMPLE BOND

BEST AVAILABLE COPY

THE UNITED STATES OF AMERICA

FOR VALUE RECEIVED PROMISES TO PAY TO

0000

SPECIMEN

13¾%
TREASURY BOND
OF 2004
Dated July 10, 1984
Due August 15, 2004
CUSIP 912810 CX 1

SPECIMEN

OR REGISTERED ASSIGNS, THE SUM OF

ONE THOUSAND DOLLARS

ON AUGUST 15, 2004, AND TO PAY INTEREST ON THE PRINCIPAL SUM FROM , AT THE RATE OF THIRTEEN AND THREE-QUARTERS PERCENT PER ANNUM, PAYABLE ON A SEMIANNUAL BASIS ON FEBRUARY 15, 1985, AND THEREAFTER ON AUGUST 15 AND FEBRUARY 15 IN EACH YEAR UNTIL THE PRINCIPAL AMOUNT BECOMES PAYABLE. AT THE DEPARTMENT OF THE TREASURY, WASHINGTON, D.C., OR, AT THE HOLDER'S OPTION, AT ANY AGENCY OR AGENCIES IN THE UNITED STATES WHICH MAY BE DESIGNATED BY THE TREASURY FROM TIME TO TIME. DESIGNATED FOR THE PURPOSE. THIS BOND IS ONE OF A SERIES OF BONDS AUTHORIZED BY CHAPTER 31 OF TITLE 31, UNITED STATES CODE, IS ISSUED PURSUANT TO DEPARTMENT OF THE TREASURY BEST SERIES NO. 50-84, DATED JUNE 30, 1984, AND IS DESIGNATED 13¾ PERCENT TREASURY BONDS OF 2004, SUBJECT TO CALL FOR REDEMPTION PRIOR TO MATURITY. THIS BOND IS SUBJECT TO ALL TAXES IMPOSED UNDER THE INTERNAL REVENUE CODE OF 1954. THIS BOND IS EXEMPT FROM ALL TAXATION NOW OR HEREAFTER IMPOSED ON THE OBLIGATION OR INTEREST BY ANY STATE, OR ANY OF THE POSSESSIONS OF THE UNITED STATES, OR BY ANY LOCAL TAXING AUTHORITY, EXCEPT AS PROVIDED IN 31 U.S.C. 3124. THIS BOND IS ACCEPTABLE TO SECURE DEPOSITS OF PUBLIC MONEYS. IT IS NOT ACCEPTABLE IN PAYMENT OF TAXES.

WASHINGTON, D.C., JULY 10, 1984.

David T. Regan
SECRETARY OF THE TREASURY

TRANSFERABLE ON THE BOOKS OF THE DEPARTMENT OF THE TREASURY.

ONE THOUSAND DOLLARS

APPENDIX F

CORRESPONDENCE

Department of the Treasury

Office of Chief Counsel
Internal Revenue Service
Branch 1
Associate Chief Counsel (International)
Room 3319
950 L'Enfant Plaza South, SW
Washington DC 20024

JUN 9, 1988

The Honorable Joaquin G. Blas
Director
Department of Revenue and Taxation
Government of Guam
855 West Marine Drive
Agana, Guam 96910

Re: Taxation of Interest on U.S. Government Obligations

Dear Director Blas:

This is in response to your letter of May 4, 1988 regarding the taxation of interest on U.S. government obligations by the Government of Guam.

Pursuant to your request, we have reviewed the opinion of the Government of Guam Attorney General dated July 21, 1987. The fundamental problem we have with accepting the position set forth in that memo is that it is inconsistent with the Treasury Regulations promulgated by the Bureau of Public Debt regarding the exemption from taxation of U.S. government bonds, notes, etc. (See attached list). The current regulations, with two exceptions, 31 CFR

sections 341.13 (Retirement Plan Bonds) and 346.13 (Individual Retirement Bonds), state that the income derived from the obligations is exempt from taxation by any state, any possession of the United States, or any local taxing authority. The regulations governing Retirement Plan Bonds and Individual Retirement Bonds do not mention taxation or exemption from taxation by possessions.

The Internal Revenue Service is bound by the regulations promulgated by the Bureau of Public Debt. However, as we indicated to Mr. Guerrero during his last visit, the Bureau of Public Debt is planning to change those regulations prospectively so that the interest on U.S. obligations will not escape all taxation.

In addition, it should be noted that many of the obligations expressly state on their face that they are exempt from taxation by possessions. (See specimen attached). These obligations are contracts between the United States and the purchaser, and the United States is bound by the terms thereof.

The Virgin Islands previously requested our advice as to whether they were authorized to tax interest on U.S. obligations and we also advised them that to do so would be contrary to the regulations promulgated by the Bureau of Public Debt.

/s/ [Illegible]
MICHAEL F. PATTON

Enclosures: as stated

Department of the Treasury
Office of Chief Counsel
Internal Revenue Service
Branch 1
Associate Chief Counsel (International)
Room 3319
950 L'Enfant Plaza South, SW
Washington, DC 20024

Sep 29 1987

CC: INTL: 421-86
Brl: GPerez-Navarro

Ms. Margaret Marquette
Office of Chief Counsel
Bureau of the Public Debt
Department of the Treasury
Washington, D.C. 20226

Re: Taxation of Federal Obligations by Possessions of the United States

Dear Ms. Marquette:

This is in response to your request for information regarding taxation of U.S. government obligations by possessions of the United States. At present, there is an inconsistency between the statute and the regulations regarding the exemption of U.S. obligations from taxation by possessions. Section 3124 of Title 31 only exempts U.S. obligations from taxation by states and their political subdivisions. Most of the pertinent regulations, however, also exempt U.S. obligations from taxation by possessions. This exemption is reflected on the debt instruments issued by the government. Your office is concerned that, as a result of the exemption contained in the regulations, there may be significant revenue loss resulting from the

interplay of the Internal Revenue Code and the tax laws of the possessions, which in certain instances results in the income derived from U.S. government securities escaping all taxation.[1]

In order to assist you in determining the extent of the revenue loss and whether legislative changes are necessary, we are providing you with an explanation of the current tax treatment in the possessions of income derived from U.S. government obligations. We are also providing you with an explanation of the tax treatment of the income if it were not exempt from taxation by the possessions. Since the tax laws of the possessions differ, each possession will be discussed separately.

In order to understand the income tax systems of the possessions, it is necessary to understand certain basic concepts of U.S. taxation. U.S. citizens, non-U.S. citizens who are resident in the U.S., and corporations organized under the laws of one of the fifty states or the District of Columbia, are taxed on income from all sources. Nonresident aliens and foreign corporations are taxed only on U.S.-source income and income effectively connected with a trade or business in the U.S. Corporations organized under the laws of a possession are treated as foreign corporation for U.S. tax purposes.

The Internal Revenue Code provides rules to determine the source of income of nonresident aliens and foreign corporations. Interest on U.S. government obligations is treated as U.S.-source income under I.R.C. §§ 861, 871, and 881 [although it has been

---

[1] Although you address the problem in terms of interest income, gain on the sale or exchange of U.S. securities is also affected.

exempted from taxation as portfolio interest of nonresident aliens and foreign corporations under I.R.C. §§ 871(h) and 881(c), respectively].

In general, the sourcing of income from the sale or exchange of U.S. government securities depends on the residence of the seller under I.R.C. § 865. If the seller is a resident of the U.S., the income is sourced in the U.S. If the seller is a nonresident (or a foreign corporation), the income is sourced outside the U.S. Thus, to the extent that residents of the possessions are treated as nonresidents for U.S. tax purposes, income from the sale or exchange of U.S. government obligations is not taxable by the U.S. to nonresidents of the U.S. residing in a U.S. possession.

The Tax Reform Act of 1986 authorizes the Secretary of the Treasury to provide separate sourcing rules for the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa. Grace Perez-Navarro and Lilo Hester of this office are responsible for drafting those regulations.

VIRGIN ISLANDS

The Virgin Islands is currently administered as an unincorporated territory subject to the jurisdiction of the Secretary of the Interior. 48 U.S.C. § 1541. The Naval Appropriations Act of 1921, 48 U.S.C. § 1397 (Supp. 1984) mirrors the provisions of the Internal Revenue Code as the tax law of the Virgin Islands. The mirror system requires that the words "Virgin Islands" be substituted for the words "United States" where appropriate.

Prior to the Tax Reform Act of 1986, I.R.C. § 934A authorized the Virgin Islands to impose a ten percent surtax on its residents. Section 934A was repealed by the Tax Reform Act of 1986. Section 1274(b) of the

Act authorizes the Virgin Islands to enact nondiscriminatory local taxes.

The "Inhabitant" Rule

Prior to the Tax Reform Act of 1986, inhabitants of the Virgin Islands (which included corporations as well as individuals) could satisfy their U.S. tax liabilities by filing one return with the Virgin Islands, provided they reported and paid tax on income from all sources to the Virgin Islands. Since the income received by inhabitants from U.S. government obligations is exempt from taxation by the Virgin Islands, the income escaped all taxation because no tax was required to be paid to the U.S. if it was paid to the Virgin Islands. The inhabitant rule was repealed by section 1275(b) of the Tax Reform Act of 1986.

Bona Fide Residents

Under the provisions of the Tax Reform Act of 1986, individuals[2] who qualify as bona fide residents of the Virgin Islands on the last day of the taxable year who report and identify income from all sources on their Virgin Islands income tax returns may exclude that income from gross income on their U.S. returns. Therefore, unless the Virgin Islands is permitted to tax the income from government obligations, the income will escape all taxation.

Non-Bona Fide Residents

A citizen or resident of the U.S. (other than a bona fide resident of the Virgin Islands) deriving income from the Virgin Islands is no longer liable to the Virgin Islands for any tax determined under the Virgin Islands mirror code. Rather, in the case of

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[2] Note that corporations cannot qualify as bona fide residents.

such an individual, his Virgin Islands tax liability is a fraction of his U.S. tax liability, based on the ratio of adjusted gross income derived from Virgin Islands sources to worldwide adjusted gross income. Such an individual is required to file identical returns with the U.S. and the Virgin Islands. The Virgin Islands' portion of the individual's tax liability will be credited against his total U.S. tax liability. In this situation, the income from U.S. obligations does not escape taxation because it is taxed as part of the worldwide adjusted gross income of the individual.

Resident Aliens

Resident aliens in the Virgin Islands are taxed on worldwide income under the mirror code. Therefore, all income derived from U.S. government securities would be includible in the income of a resident alien of the Virgin Islands if the income were not exempt from taxation by the possessions under the existing regulations.

A resident alien of the Virgin Islands is considered a nonresident alien for U.S. tax purposes. Nonresident aliens are taxed on U.S.-source income and income effectively connected with a trade or business in the U.S. Under the provisions of I.R.C. § 871(a)(1)(A), interest income is considered U.S.-source income but has been exempted from taxation under I.R.C. § 871(h). (Note that if the interest were-taxed [sic] in both the U.S. and the Virgin Islands, the taxpayer would be entitled to receive a foreign tax credit under § 901(b)(2) as mirrored by the Virgin Islands for the U.S. tax paid on the interest.)

Gain on the sale or exchange of U.S. government obligations by a nonresident alien is not taxable by the U.S. because it is sourced outside the U.S. under

the provisions of I.R.C. § 865. Note, however, that I.R.C. § 934(b)(4) authorizes the Secretary to prescribe by regulations sourcing rules with respect to the Virgin Islands. Therefore, if it were decided that the exemption should be retained, the sourcing rules for gain on the sale or exchange of U.S. government securities could be changed so that the income was sourced in the U.S. and thus subject to tax.

Corporations

As a result of the repeal of the inhabitant rule, corporations can no longer escape the taxation of income derived from U.S. government obligations. A U.S. corporation doing business in the Virgin Islands is now required to file a U.S. tax return and report income from all sources. Thus, interest income and gain from the sale or exchange of government securities would be taxed by the U.S. Under the Virgin Islands mirror code, a U.S. corporation is taxed as a foreign corporation and, therefore, would only be taxed on its Virgin Islands-source income and income effectively connected with a trade or business in the Virgin Islands. Interest on U.S. government obligations is not treated as V.I.-source income under the mirror provisions of I.R.C. § 861. Income from the sale or exchange of U.S. government obligations would not be taxable by the Virgin Islands under the mirror provisions of I.R.C. § 865(a)(2) which source income from the sale of personal property by a nonresident outside the Virgin Islands. Since income derived by U.S. corporations from the sale or exchange of government securities is not taxable under the Virgin Islands mirror code, removing the exemption would have no affect in this situation.

A corporation chartered in the Virgin Islands is required under the Virgin Islands mirror code to file

a Virgin Islands tax return and report income from all sources. If the Virgin Islands were permitted to tax Virgin Islands corporations on income from U.S. obligations, all of the income from U.S. government obligations would be taxable by the Virgin Islands. For U.S. tax purposes, interest paid on U.S. government obligations would either he taxable by the U.S. as U.S.-source income earned by a foreign corporation under I.R.C. § 881 [although it would qualify for the portfolio interest exemption under I.R.C. § 881(c)], or as income of a domestic corporation under I.R.C. § 881(b).[3] Income from the sale or exchange of U.S. government obligations would, however, escape taxation because it is not U.S.-source income of a foreign corporation. This could be corrected by changing the sourcing rules under the regulatory authority provided by I.R.C. § 934.

GUAM AND THE NORTHERN MARIANA ISLANDS

The 1950 Organic Act of Guam establishes a mirror code system for Guam similar to that of the Virgin Islands. The Covenant to Establish a Commonwealth of the Northern Mariana Islands, the pertinent sections of which became effective in January 1979,

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[3] I.R.C. § 881(b) provides that a possession corporation will not be treated as a foreign corporation for purposes of the portfolio interest exemption if at all times during the taxable year less than 25% of the stock is owned by foreign persons, at least 65% of the corporation's gross income is effectively connected to a trade or business in the possession or the U.S. for the preceding 3 years, and no substantial part of the corporation's income is used to satisfy obligations to persons who are not bona fide residents of the possession or the U.S. The purpose of this rule is to prevent foreign persons not resident in the possessions from using possessions corporations as conduits to obtain U.S.-source income without paying U.S. or territorial taxes.

provides in section 601 that the U.S. income tax laws are in force in the Northern Mariana Islands "in the same manner as those in force in Guam." It also provides that references to Guam in the Internal Revenue Code will be deemed to refer to the Northern Mariana Islands as well. Therefore, the discussion which follows applies to both Guam and the Northern Mariana Islands.

Residents

Under section 935 of the Internal Revenue Code, a U.S. or Guam citizen or resident is required to file only one return with Guam if he is a resident of Guam on the last day of the year, or with the U.S. if he is a resident of one of the fifty states or the District of Columbia on the last day of the year. Section 935 also provides that, for purposes of the Guamanian individual income tax, income from U.S. sources is to be treated as domestic source income; for purposes of the U.S. individual income tax, income from Guamanian sources is to be treated as domestic source. Thus, residents of Guam on the last day of the taxable year would escape taxation of income derived from U.S. government obligations unless the possessions were permitted to tax the interest because residents of Guam on the last day of the taxable year are not required to report and pay tax to the U.S.

Nonresidents

An individual who is neither a resident of the U.S. or Guam on the last day of the taxable year is required to file one tax return—with Guam if he is a citizen of Guam (but not otherwise a citizen of the U.S.), or with the U.S. if he is not a citizen of Guam. As a result, the income derived from U.S. government

obligations of all citizens of Guam not otherwise citizens of the U.S. escapes all taxation. (In light of the fact that Guam is primarily inhabited by U.S. government personnel, it is unlikely that a significant number of people qualify as true citizens of Guam.)

Corporations

Like the Virgin Islands, Guam taxes U.S. corporations as foreign corporations. Similarly, corporations chartered in Guam are generally considered foreign corporations for U.S. tax purposes. Please refer to the discussion of the tax consequences to corporations contained under the Virgin Islands heading.

Tax Reform Act of 1986

Section 1271 of the Tax Reform Act of 1986 authorizes Guam, American Samoa, and the Northern Mariana Islands to enact their own tax laws with respect to income from sources within, or effectively connected with the conduct of a trade or business within any such possession, or income received or accrued by any resident of such possession, provided an implementing agreement is in effect between the U.S. and such possession. To date, none of these possessions has entered into an implementing agreement with the U.S., although it is anticipated that implementing agreements will be entered into within the next year. (Note that section 1277(d) of the Tax Reform Act of 1986 requires a report to be filed with the Senate if implementing agreements have not been executed within a year of the date of enactment of the Act.)

When Guam and the Northern Mariana Islands enter into implementing agreements with the U.S., all persons with Guam or Northern Mariana Islands

income will be required to file two returns—one with the appropriate possession and one with the U.S. Individuals who qualify as bona fide residents of Guam or the Northern Mariana Islands will be taxed by the U.S. on worldwide income but shall exclude income which is sourced or effectively connected to a trade or business in the possession in which they are bona fide residents. I.R.C. § 931. Individuals who do not qualify as bona fide residents will be required to file a return with Guam or the Northern Mariana Islands, as appropriate, on which they report their Guam or Northern Mariana Islands-source income and income effectively connected with a trade or business in the possession. They will also be required to file a U.S. tax return and pay tax on their worldwide income. They will receive a credit for taxes paid to the possession under I.R.C. § 901, subject to the limitations of I.R.C. § 904.

AMERICAN SAMOA

Congress granted the legislature of American Samoa the authority to impose its own income tax. In 1963, the American Samoan legislature adopted a mirror version of the Internal Revenue Code, but with a number of modifications.

U.S. Citizens Residing in American Samoa

Although American Samoa is on a mirror system, U.S. citizens who are resident in American Samoa are required to file two returns—one with the U.S. and one with American Samoa. Section 931 provides, in effect, that any U.S. citizen resident in American Samoa who meets a certain threshold of possessions source income, is exempt from U.S. tax on all foreign-source income. If a U.S. citizen has American Samoa-source income which does not qualify for the section

931 exclusion, the U.S. grants a foreign tax credit against the U.S. tax liability of U.S. citizens for taxes paid on income derived from American Samoa. Thus, U.S. citizens resident in American Samoa are taxed by the U.S. on all income derived from U.S. government obligations. U.S. citizens resident in American Samoa are subject to American Samoa income tax on income sourced in American Samoa. Interest on U.S. government obligations is not sourced in American Samoa and would not be taxed by American Samoa, regardless of whether the possessions are authorized to tax income from U.S. government obligations. Gain on the sale or exchange of U.S. government obligations under the current sourcing rules would be taxable as Samoan-source income if it were permitted to be taxed by the possessions.

Native Residents

Native residents of American Samoa are classified as nonresident aliens for U.S. tax purposes. As such, they are taxed on U.S.-source income and income effectively connected with a trade or business in the U.S. Thus, interest on U.S. government obligations earned by native residents is taxable by the U.S., although it qualifies for the portfolio interest exemption under I.R.C. § 871(h). Gain on the sale or exchange of U.S. government obligations is not subject to tax by the U.S. because it is sourced outside the U.S.

Corporations

Corporations in American Samoa are taxed by American Samoa in the same manner that the Virgin Islands, Guam and the Northern Mariana Islands currently tax corporations.

Tax Reform Act of 1986

As previously stated in the discussion of Guam and the Northern Mariana Islands, the Tax Reform Act of 1986 authorizes American Samoa to replace, the mirror code system with its own tax laws (American Samoa also had this authority prior to the enactment of the Tax Reform Act of 1986). Once an implementing agreement between American Samoa and the U.S. goes into effect, the provisions of I.R.C. § 931 will become effective.[4] Under I.R.C. § 931, an individual who is a bona fide resident of American Samoa during the entire taxable year, will exclude from U.S. gross income American Samoan-source income and income effectively connected with the conduct of a trade or business in American Samoa. A bona fide resident of American Samoa, would, however, still be required to report and pay tax to the U. S. on income from all sources other than American Samoa. Thus, interest from U.S. government securities, which is sourced in the U.S., would be taxable by the U.S. Gain on the sale or exchange of U.S. government securities, however, would not be taxed by the U.S. because it is presently sourced at the residence of the seller. As previously stated, section 931 authorizes the Secretary to prescribe by regulations sourcing rules for American Samoa. Therefore, to the extent that the general sourcing rules (I.R.C. §§ 861-865) as applied to American Samoa would permit certain types of income to escape all taxation, the sourcing rules could be changed under the regulations.

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[4] It is anticipated that American Samoa and the United States will sign an implementing agreement within the next few weeks.

PUERTO RICO

The substantive Puerto Rican tax rules governing individuals are contained in the Puerto Rican Income Tax Act which was adopted by the Puerto Rican legislature using the 1939 U.S. Internal Revenue Code as a model. Puerto Rico only taxes individuals who are residents in Puerto Rico or who are non-residents that have Puerto Rican-source income. To the extent that a Puerto Rican resident derives foreign-source income (i.e., either U.S.-source or other non-Puerto Rican source income), he may claim a foreign tax credit for the U.S. and other foreign taxes paid on such income.

U.S. Citizens

All U.S. citizens in Puerto Rico are taxable under the Internal Revenue Code on their worldwide income. In the case of a U.S. citizen who is a resident of Puerto Rico for the entire taxable year, or who is a part-year Puerto Rican resident and who was a Puerto Rican resident for the previous two years, section 933 provides for an exclusion without dollar limitations for all income "from sources within Puerto Rico." A U.S. citizen who is not present in Puerto Rico long enough to qualify for the exclusion is eligible for the foreign tax credit under section 901 of the Code to the extent of the section 904 limitation. Under this system, income derived from U.S. government securities does not escape taxation.

Resident Aliens

Resident aliens of Puerto Rico who receive income from U.S. government obligations are not taxed under Puerto Rico's tax laws. The U.S., however, generally taxes resident aliens of Puerto Rico as

resident aliens of the U.S. Therefore, income from U.S. government obligations is includible in worldwide income and does not escape taxation.

Corporations

Corporations in Puerto Rico are taxed by Puerto Rico in substantially the same manner that Guam and the Virgin Islands currently tax corporations.

WAKE ISLAND, JOHNSTON ISLAND AND MIDWAY ISLAND

Wake Island, Johnston Island, and Midway Island have no native inhabitants and are occupied almost exclusively by U.S. government employees. None of these islands has an internal income tax law. U.S. citizens who are residents of these islands are subject to U.S. tax on worldwide income. Resident aliens of these islands are taxed as resident aliens of the U.S. and are subject to tax on worldwide income. Income from U.S. government obligations does not escape taxation in these possessions.

THE FEDERATED STATES OF MICRONESIA AND THE MARSHAL ISLANDS

As of November 7, 1986, the Federated States of Micronesia and the Marshall Islands (which are part of the chain of islands known as the Carolina Islands) are no longer U.S. possessions.

CONCLUSION

Under the present system, the following classes of taxpayers deriving income from U.S. obligations are not subject to tax on that income:

- bona fide residents of the Virgin Islands on the last day of the taxable year;

- residents of Guam and the Northern Mariana islands on the last day of the year;
- citizens of Guam and the Northern Mariana Islands not resident in Guam, the Northern Mariana Islands, or the U.S. on the last day of the year; and
- possessions corporations, but only with respect to gain on the sale or exchange of U.S. government obligations.

The revenue loss problem in Guam and the Northern Mariana Islands will be virtually eliminated with respect to individuals when these possessions enter into implementing agreements because the U.S. will tax all citizens and residents of these possessions on worldwide income. The revenue loss problem may be completely eliminated in these possessions (as well as American Samoa) by changing the sourcing rule for gain on the sale or exchange of U.S. government obligations so that such income is sourced in the U.S.

The government of the Virgin Islands believes that section 3124 and the regulations should not be construed to prohibit the Virgin Islands from taxing U.S. government obligations because the doctrine of sovereign immunity upon which section 3124 and the regulations are based would not be violated. The Virgin Islands argues that, even though the Virgin Islands tax is treated as a separate territorial tax, its tax laws are actually enacted by the U.S. Congress and, therefore, the tax is not one imposed by the Virgin Islands on the U.S. obligations. (This argument would not apply to any nondiscriminatory local laws which the Virgin Islands has now been authorized to enact.) By adopting the Virgin Islands' position and incorporating it into the regulations relating to the

exemption, the revenue loss created by the exemption would be eliminated in the Virgin Islands.

Double taxation will not pose a problem if it is determined that the regulations should be amended to permit the possessions to tax income on U.S. government obligations. For U.S. tax purposes, taxpayers would be entitled to a foreign tax credit under I.R.C. § 901, subject to the limitations of I.R.C. § 904 for taxes paid to any of the possessions. In addition, the implementing agreement between the U.S. and the Virgin Islands contains a mutual agreement procedure provision to prevent double taxation. The implementing agreements being negotiated with the other possessions will contain a similar provision.

* * * *

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CC: FO: GL-566-84
KARoth

J'ada M. Finch-Sheen
Attorney General of the Virgin Islands
P.O. Box 280
St. Thomas, Virgin Islands 00801

Attn: Assistant Attorney General
Kevin C. Reilly

In re: Virgin Islands-Ability of V.I. to Tax Interest from U.S. Government Securities

Dear Mr. Finch-Sheen

A letter of September 24, 1984 to Gerald S. Rock, Esq. of the U.S. Treasury Department, Assistant Chief Counsel, Bureau of Public Debt has been forwarded to this office for response. The question involved the appropriateness of taxation of interest on U.S debt obligations by the Virgin Islands tax administration. We conclude that the Virgin Island government may not assert its territorial income tax on interest earned on obligations or U.S. government securities.

It is our understanding that the issue arose in the context of litigation by the *West Indies Investments Company v. Olive* in the U.S. District Court in the District of Virgin Islands. The Virgin Islands government argues that there is a deficiency in Virgin Island income tax due to the taxpayer's exclusion from income of interest on U.S. Treasury bonds. Attorneys for the taxpayers maintain that the interest is exempt by reason of I.R.C. § 103, as mirrored for use in the territorial income tax system of the Virgin Islands. In addition, the taxpayers note that the face of the U.S. bond states that it is exempt from taxation by a U.S. possession.

Both parties focus their attention on the effect of the mirroring provisions of the Virgin Islands Revised Organic Act. We do not consider the so-called "Mirror Code" to be dispositive of the question. Under Section 28(a) of that statue, 48 U.S.C., §1397, a territorial income tax of the Virgin Islands was created which implemented the statute identical to the Internal Revenue Code of 1954, including its amendments, but required the substitution of terms and nomenclature to effect a "mirroring" of the federal tax system. At a minimum, where the words "United States" are used in the Internal Revenue Code, the words "Virgin Islands" must be substituted. In addition, changes in nomenclature necessary to avoid confusion as to the tax consequences contemplated by Congress are also required. *Chicago Bridge and Iron Company v. Wheatley*, 430 F 2d 973 (3d Cir. 1960). A similar statute is in effect for the U.S. possession, Guam, enacted in 48 U.S.C. §§1421i(b) and 1421i(c) and requires that "except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939 shall be read so as to substitute 'Guam' for 'United States', 'governor or his delegate' for 'secretary or his delegate', 'governor or his delegate' for 'Commissioner of Internal Revenue' and 'Collector of Internal Revenue', 'District Court of Guam' for 'district court' and with other changes in nomenclature in other language, including the omission of inapplicable language, where necessary to effect the intent of the section." This statute provides a guide for the correct manner in which the substitution of nomenclature should be made in the Virgin Islands Code. The mirroring necessary to effect the territorial tax system extends to the Treasury Regulations as well. *Vitco Inc. v. Government of Virgin Islands*, 560 F 2d 180 (3d Cir. 1977).

The U.S. taxation of interest on governmental securities is governed by I.R.C. §103. The parties' have drawn their competing arguments from their interpretation of that section. For U.S. income tax purposes, section 103 provides a limited exclusion from gross income of interest on the obligations of a state, territory or possession of the U.S. or a political subdivision. It does not exclude from income interest earned on obligations of the U.S. government. In Treasury Regulations §1.103-4, it is made explicit that interest earned on federal debt instruments are not exempt from federal income tax. If section 103 is mirrored, it would read as follow (substituted words are in brackets):

> (a) GENERAL RULE—Cross income does not interest on—
>
> (1) The obligation of a State, a territory, or a possession of the [Virgin Islands] or any political subdivision of any of the foregoing, or of the District Columbia; and
>
> (2) Qualified scholarship funding bonds.

Section 103 as mirrored provides that the interest earned on an obligation of a subdivision of the Virgin Islands, including one of its states, territories, or possessions, could be exempt from Virgin Island taxation. By negative implication, the Virgin Islands [illegible] Administration infers that interest from U.S. obligations are subject to its taxing authority. The taxpayers argue instead that the provision as mirrored should also substitute the phrase "United States" for the word "State," thus excluding the interest from Virgin Island gross income. We do not believe that such substitution is permissible.

Neither party has addressed the fact that nothing in the Revised Organic Act or in section 103 as mir-

rored operates to waive the immunity from taxation by local jurisdictions which the United States debt instruments enjoy. The rule that interest from U.S. obligations is not subject to taxation by state or local jurisdictions is codified in 31 U.S.C. §3124 and was recently upheld as part of the doctrine of sovereign immunity. *Memphis bank and Trust Company v. Garner*, 103 Supreme Court 692 (1983). In *Memphis Bank*, the Supreme Court interpreted the constitutional rule of tax immunity established in *M'Culloch v. Maryland* 4 Wheat. 316, 4 L.Ed. 679 (1819). Because the economic effect of the tax involved in *Memphis Bank* resulted in discrimination against the holders of federal property, the Court concluded that it was an unconstitutional tax. Though not directly analogous, the rule of these cases has been extended by treasury regulations to Treasury bills (31 C.F.R. §309.4), Treasury bonds sold at competitive bids (31 C.F.R. §340.3) and various U.S. savings bonds (31 C.F.R. §§316.9, 332.9, and 342.5).

If you have questions concerning this advice, please contact Kristine Roth at FTS 8-202-566-5862. Copies of this advice are being forwarded to Gerald Rock, Assistant Chief Counsel, Bureau of Public Debt, Daniel Folzenlogen, Special Appellant Counsel, Office of the Associate Chief Counsel, Internal Revenue Service, and Michael Patton, General Litigation Division.

Sincerely,

FRED T. GOLDBERG, JR.
Chief Counsel
Internal Revenue service

/S/ JAMES F. KEARNEY
JAMES F. KEARNEY
Acting District Counsel
Foreign Operations